

DANIEL T. MCCARTHY

3 Court Square Apt. 809 | Long Island City, NY 11101 | (631) 332-1750 | dtm222@cornell.edu

May 15, 2023

Hon. Judith C. McCarthy
The Hon. Charles L. Brieant Jr.
Federal Building and United States Courthouse
300 Quarropas St.
White Plains, NY 10601-4150

Dear Judge McCarthy:

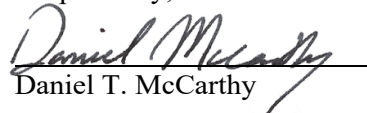
I am writing to apply for a clerkship in your chambers for the 2024–2025 term. I am a 2021 graduate of Cornell Law School, and I believe that my experience and qualifications make me a good candidate for this position.

Prior to graduating from Cornell Law School, I interned for Hon. Joseph F. Bianco, for whom I conducted legal research, prepared a draft Memorandum and Order, and drafted a bench memorandum. Since graduating, I have worked in the litigation group of a mid-sized firm in Manhattan, where I have been exposed to a variety of early opportunities for substantive work, including drafting memoranda of law in connection with motion practice. These experiences have helped me refine my legal research and writing skills.

Attached to this application you will find my resume, undergraduate transcript, law school transcript, writing sample, and a list of references. My letters of recommendation will follow.

Thank you for your time and consideration.

Respectfully,


Daniel T. McCarthy

Attachments

DANIEL T. MCCARTHY

3 Court Square Apt. 809 | Long Island City, NY 11101 | (631) 332-1750 | dtm222@cornell.edu

EDUCATION

CORNELL LAW SCHOOL, Ithaca, N.Y.

J.D., *cum laude*, May 2021

Activities: *Cornell International Law Journal*, Notes Editor; *LII: Supreme Court Bulletin*, Associate

Honors: *CALI Awards* in Administrative Law and Advanced Legal App Building
Excellence in Presentation and *People's Choice Award* in Littler Legal Apps Competition

STONY BROOK UNIVERSITY, Stony Brook, N.Y.

B.A., *summa cum laude*, Department Honors in Political Science, May 2017

Thesis: *Nuclear Power: The Effect of Knowledge on Risk Perception*

EXPERIENCE

OTTERBOURG, P.C., New York, N.Y.

Summer Law Clerk, May 2020 – July 2020; *Law Clerk*, Sept. 2021 – May 2022; *Associate*, May 2022 – Present
 Representing clients in various stages of civil litigation. Drafted pleadings, memoranda of law on dispositive motions, discovery requests, and subpoenas in federal and state courts. Representing receivers in multiple SEC enforcement actions pending in federal district courts. Representing the receiver in a Martin Act enforcement action pending in the New York State Supreme Court. Researched and drafted a successful motion to dismiss an action brought in federal district court alleging violations of the Fair Debt Collection Practices Act and New York General Business Law. Researched and drafted a memorandum addressing the effect of insolvency on the availability of injunctive relief under relevant Second Circuit precedent.

NEW YORK STATE ATTORNEY GENERAL, Syracuse, N.Y.

Clinical Intern, January 2020 – May 2020

Worked with Assistant Attorneys General in defending claims brought against various state entities and employees. Drafted a memorandum assessing the merits of a Section 1983 and false arrest action brought by an advocacy group against several private security guards and officers of the New York State Police.

HON. JOSEPH F. BIANCO, U.S. Court of Appeals for the Second Circuit, New York, N.Y.

Judicial Intern, June 2019 – August 2019

Provided research assistance to judge and clerks on pending cases. Drafted a bench memorandum for an appellate court case and prepared a draft Memorandum and Order for a district court case.

LAW OFFICES OF JOSEPH C. STROBLE, Sayville, N.Y.

Paralegal, April 2017 – July 2018

Took witness statements for use in furtherance of settlement negotiations. Drafted discovery requests.

OFFICE OF GENERAL COUNSEL AT STONY BROOK UNIVERSITY, Stony Brook, N.Y.

Intern, August 2016 – December 2016

Conducted research and prepared short memoranda on university legal questions.

PUBLICATIONS

Discharge in Non-Individual Subchapter V Cases: Hard Decisions for Small Business Debtors (as contributor) forthcoming in "Norton Journal of Bankruptcy Law and Practice."

NCAA v. Alston (co-authored with Jin-Taek Hong) in "The Federal Lawyer" (July/August 2021).

Property & Federal Common Law—Trustee's Avoidance Powers (as contributor) in "Norton Journal of Bankruptcy Law and Practice" (30 NO. 1 J. BANKR. L. & PRAC. NL Art. 2).

BAR ADMISSIONS

New York State, S.D.N.Y., E.D.N.Y.

INTERESTS

Music composition and legal software design.

6/15/2021

Grade Reports

Cornell Law School - Grade Report - 06/15/2021

Daniel T McCarthy

JD, Class of 2021

Course	Title	Instructor(s)	Credits	Grade
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Fall 2018 (8/21/2018 - 12/17/2018)

LAW 5001.2	Civil Procedure	Clermont	3.0	A-
LAW 5021.4	Constitutional Law	Rana	4.0	A-
LAW 5041.3	Contracts	Rachlinski	4.0	B+
LAW 5081.6	Lawyering	Goldberg	2.0	B+
LAW 5121.2	Property	Sherwin	3.0	A-

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	16.0	16.0	16.0	16.0	16.0	16.0	3.5425
Cumulative	16.0	16.0	16.0	16.0	16.0	16.0	3.5425

Spring 2019 (1/15/2019 - 5/14/2019)

LAW 5001.2	Civil Procedure	Gardner	3.0	B+
LAW 5061.2	Criminal Law	Margulies	3.0	A-
LAW 5081.6	Lawyering	Goldberg	2.0	A-
LAW 5151.3	Torts	Siliciano	3.0	A-
LAW 6441.1	Federal Income Taxation	Green	3.0	B+

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	14.0	14.0	14.0	14.0	14.0	14.0	3.5242
Cumulative	30.0	30.0	30.0	30.0	30.0	30.0	3.5340

Fall 2019 (8/27/2019 - 12/23/2019)

LAW 6131.1	Business Organizations	Hockett	3.0	A-
LAW 6241.1	Federal White Collar Crime	Garvey	3.0	B+
LAW 6242.1	Corporate Finance	Omarova	3.0	S
LAW 6801.1	Remedies	Sherwin	3.0	A-
LAW 7398.101	Land Use Law	Peñalver	3.0	A-

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	15.0	15.0	15.0	15.0	12.0	12.0	3.5850
Cumulative	45.0	45.0	45.0	45.0	42.0	42.0	3.5485

Spring 2020 (1/21/2020 - 5/8/2020)

Due to the public health emergency, spring 2020 instruction was conducted exclusively online after mid-March and law school courses were graded on a mandatory Satisfactory/Unsatisfactory basis. Four law school courses were completed before mid-March and were unaffected by this change. Other units of Cornell University adopted other grading policies. Thus, letter grades other than S/U appear on some spring 2020 transcripts. No passing grade received in any spring 2020 course was included in calculating the cumulative merit point ratio.

LAW 6001.1	Accounting For Lawyers	Sarachan	2.0	SX
LAW 6461.1	Financial Institutions	Hockett	3.0	SX
LAW 6641.1	Professional Responsibility	Atiq	3.0	SX
LAW 7925.301	New York Attorney General Practicum 1	Callery/McArdle/Sutton	6.0	SX

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	14.0	14.0	14.0	14.0	0.0	0.0	N/A
Cumulative	59.0	59.0	59.0	59.0	42.0	42.0	3.5485

Fall 2020 (8/25/2020 - 11/24/2020)

LAW 6011.1	Administrative Law	Stiglitz	3.0	A	CALI
LAW 6121.1	Bankruptcy	Lienau	3.0	A-	
LAW 6304.1	Delivering Legal Services through Technology - Legal Tech Insights & App-Building Skills	Mulcahy/Rechtschaffen	3.0	A+	
LAW 6644.101	Derivatives Law & Policy	Awrey	3.0	B+	
LAW 7264.101	Faculty At Home Seminar: Fintech	Hockett/Kim	1.0	SX	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	13.0	13.0	13.0	13.0	12.0	12.0	3.8325
Cumulative	72.0	72.0	72.0	72.0	54.0	54.0	3.6116

^ Dean's List

6/15/2021

Grade Reports

Spring 2021 (2/8/2021 - 5/7/2021)

LAW 6070.1	Federal Policy Making	Simonetta	1.0	SX	
LAW 6274.1	Advanced Legal App Building	D'Amore/Mulcahy/Rechtschaffen	1.0	SX	CALI
LAW 6401.1	Evidence	Weyble	3.0	A	
LAW 6566.1	Intensive Depositions	Grossman	1.0	A+	
LAW 6569.1	Introduction to Depositions	Fongyee Whelan	2.0	SX	
LAW 6821.2	Securities Regulation	Whitehead	4.0	A	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	12.0	12.0	12.0	12.0	8.0	8.0	4.0412
Cumulative	84.0	84.0	84.0	84.0	62.0	62.0	3.6670

^ Dean's List

Total Hours Earned: 84

Received JD cum laude on 05/30/2021

Daniel McCarthy
109091190 - USB ID
1995-02-22



Stony Brook University

The State University of New York
Stony Brook, NY 11794
631-632-6000

Print Date : 2023-05-14
Send To **DANIEL MCCARTHY**
DMCCARTHY452@GMAIL.COM

REQ DESIGNATION : D.E.C. A2 & Skill 2. Required grade: A through C

TERM GPA : 3.59 Units Earned : 13.0
CUM GPA : 3.59 Units Earned : 32.0
Dean's List

- - - - Degrees Awarded - - - -

Degree : Bachelor of Arts
Confer Date : 2017-05-19
Degree Honors : Summa Cum Laude
Plan : Political Science
Plan : Writing Minor

Spring 2014

Course	Description	Units	Grade
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Program : Arts and Sciences
Plan : Political Science Major

Session : Full Spring Semester Session (2014-01-27 to 2014-05-21)

CAR 110	Career Dev & Decision Making	2.0	A
LDS 102	Leadership and Service	1.0	A
Course Topic(s): Social Entrepreneurship			
PHI 105	Politics and Society	3.0	A
REQ DESIGNATION : DEC G. Required grade: A through D			
PHI 200	Intro to Ancient Philosophy	3.0	A-
REQ DESIGNATION : DEC I. Required grade: A through D			
POL 102	Intro to American Government	3.0	A
REQ DESIGNATION : DEC F & Skill 4. Required grade: A through D			

TERM GPA : 3.92 Units Earned : 12.0
CUM GPA : 3.75 Units Earned : 44.0
Dean's List

Transfer Credit from LIU Post

Applied Toward Arts and Sciences Program

Incoming Course				
TRH 100	PRE MATRIC	13.0	T	
2013 Spring				

Transferred to Term Fall 2013 as

TRH	UGCRED Pre-SB Matric Ugrad Transfer	13.0	T	
Transfer Credit from Suffolk County Community College-Ammerman (main)				
Applied Toward Arts and Sciences Program				
Course Trans GPA:	0.00 Transfer Totals :	3.0		

Test/Transfer Applied Toward Requirements

Test Trans GPA:	0.00 Transfer Totals :	6.0
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Fall 2014

Course	Description	Units	Grade
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Program : Arts and Sciences
Plan : Political Science Major

Session : Full Fall Semester Session (2014-08-25 to 2014-12-17)

HUI 236	Italian-American Scene	3.0	A
REQ DESIGNATION : DEC K. Required grade: A through D			
MAR 104	Oceanography	3.0	B+
REQ DESIGNATION : DEC E. Required grade: A through D			
POL 101	World Politics	3.0	A-
REQ DESIGNATION : DEC F. Required grade: A through D			
POL 318	Voters and Elections	3.0	A
REQ DESIGNATION : DEC F. Required grade: A through D			

TERM GPA : 3.75 Units Earned : 12.0
CUM GPA : 3.75 Units Earned : 56.0
Dean's List

Spring 2015

Course	Description	Units	Grade
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Course	Description	Units	Grade
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Program : Arts and Sciences
Plan : Political Science Major

Session : Full Fall Semester Session (2013-08-26 to 2013-12-18)

AST 248	Search for Life in the Univers	3.0	B+
REQ DESIGNATION : DEC H. Required grade: A through D			
LDS 101	Introduction to Stony Brook	1.0	S
POL 103	Intro to Comparative Politics	3.0	A-
REQ DESIGNATION : DEC F. Required grade: A through D			
POL 201	Intro to Stat Methin Pol Sci	3.0	A-
REQ DESIGNATION : DEC C & Skill 1. Required grade: A through C			
WRT 102	Intermed Writing Workshop A	3.0	A-

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Daniel McCarthy
109091190 - USB ID
1995-02-22



Stony Brook University

The State University of New York
Stony Brook, NY 11794
631-632-6000

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Program : Arts and Sciences
Plan : Political Science Major

TERM GPA : 4.00 Units Earned : 12.0
CUM GPA : 3.83 Units Earned : 98.0
Dean's List

Session : Full Spring Semester Session (2015-01-26 to 2015-05-20)

Summer 2016

PHI 108 Logical and Critical Reasoning 3.0 A-
REQ DESIGNATION : DEC B. Required grade: A through D
POL 317 American Election Campaigns 3.0 A
REQ DESIGNATION : DEC F. Required grade: A through D
POL 324 Amer Pol Parties & Pressr Grps 3.0 A
REQ DESIGNATION : DEC F. Required grade: A through D
POL 325 Civil Liberties & Civil Rights 3.0 A-
REQ DESIGNATION : DEC F. Required grade: A through D

TERM GPA : 3.84 Units Earned : 12.0
CUM GPA : 3.77 Units Earned : 68.0
Dean's List

Fall 2015

Course	Description	Units	Grade
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Program : Arts and Sciences
Plan : Political Science Major

Session : Full Fall Semester Session (2015-08-24 to 2015-12-16)

POL 319 Business Law 3.0 A
POL 346 Political Psychology 3.0 A
REQ DESIGNATION : DEC F. Required grade: A through D
SOC 361 Historical Devel of Soc Theory 3.0 A
REQ DESIGNATION : DEC F. Required grade: A through D
WRT 380 Advanced Research Writing 3.0 A-
WRT 488 Internship 3.0 S

TERM GPA : 3.92 Units Earned : 15.0
CUM GPA : 3.80 Units Earned : 86.0
Dean's List

Spring 2016

Course	Description	Units	Grade
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Program : Arts and Sciences
Plan : Political Science Major

Session : Full Spring Semester Session (2016-01-25 to 2016-05-18)

POL 336 US Foreign Policy 3.0 A
REQ DESIGNATION : DEC F. Required grade: A through D
POL 375 The Political Animal 3.0 A
SOC 348 Global Sociology 3.0 A
REQ DESIGNATION : DEC F. Required grade: A through D
WRT 381 Adv Analytic & Argument Writ 3.0 A

Course	Description	Units	Grade
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Program : Arts and Sciences
Plan : Political Science Major
Plan : Writing Minor

Session : Summer I - C (2016-05-31 to 2016-07-09)

HIS 214 Modern Latin America 3.0 A
REQ DESIGNATION : DEC J. Required grade: A through D

Session : Summer II - D (2016-07-11 to 2016-08-20)

SPN 112 Elementary Spanish II 4.0 A-
REQ DESIGNATION : Skill 3. Required grade: A thru C

TERM GPA : 3.81 Units Earned : 7.0
CUM GPA : 3.83 Units Earned : 105.0

Fall 2016

Course	Description	Units	Grade
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Program : Arts and Sciences
Plan : Political Science Major
Plan : Writing Minor

Session : Full Fall Semester Session (2016-08-29 to 2016-12-21)

POL 495 Sr Honors Proj in Pol Sci 3.0 A
SOC 330 Media and Society 3.0 A
REQ DESIGNATION : DEC F. Required grade: A through D
WRT 488 Internship 3.0 S

TERM GPA : 4.00 Units Earned : 9.0
CUM GPA : 3.84 Units Earned : 114.0
Dean's List

Winter 2017

Course	Description	Units	Grade
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Program : Arts and Sciences
Plan : Political Science Major
Plan : Writing Minor

Session : Winter (2017-01-03 to 2017-01-21)

POL 323 US Congress 3.0 A
REQ DESIGNATION : DEC F. Required grade: A through D

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Daniel McCarthy
109091190 - USB ID
1995-02-22



Stony Brook University

The State University of New York
Stony Brook, NY 11794
631-632-6000

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TERM GPA :	4.00	Units Earned :	3.0
CUM GPA :	3.85	Units Earned :	117.0

Spring 2017

Course	Description	Units	Grade
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Program : Arts and Sciences
Plan : Political Science Major
Plan : Writing Minor

Session : Full Spring Semester Session (2017-01-23 to 2017-05-17)

POL 496	Sr Honors Proj in Pol Sci	3.0	A
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TERM GPA :	4.00	Units Earned :	3.0
CUM GPA :	3.85	Units Earned :	120.0

Undergraduate Career Totals

CUM GPA :	3.85	Units Earned :	120.0
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End Of Transcript

This transcript processed and delivered by Parchment

Diane Bello
Diane Bello, University Registrar



STONY BROOK UNIVERSITY
TRANSCRIPT GUIDE
Office of the Registrar
www.stonybrook.edu/registrar

ACCREDITATION

As part of the State University of New York, Stony Brook University is accredited by the Middle States Association of Colleges and Schools; 3624 Market Street; Philadelphia, PA 19104-2680. For specific information about the accreditation of University Schools and Programs refer to the appropriate University Bulletin.

GRADING SYSTEM

A Superior; B Good; C Satisfactory; D Minimum Passing Grade; F Failure; Plus / Minus grading in effect from Fall 1981.

Grade point equivalents: A = 4.00, A- = 3.67, B+ = 3.33, B = 3.00, B- = 2.67, C+ = 2.33, C = 2.00, C- = 1.67, D+ = 1.33, D = 1.00, F = 0.00.

Other grades are W – Withdrawn, I – Incomplete, NR – No Record (a temporary mark to be used only for students who never participated in the course); I/F, N/F, N/U (Fall 1982 and later)

Grade originally reported as Incomplete or No Record, converted to failure after following makeup deadline; T – Transfer credit. WVR – Waiver of course work; WP – Withdrew Passing and WF – Withdrew Failing (used prior to Fall 1976); R – Attended first term of a course in which a grade is assigned only after completion of both terms; P/NC – Pass/No Credit, student-elected grade conversion option (Fall 1970-Spring 1978, W and F grades converted to NC; Fall 1978 and later, F grades alone converted to NC). Effective Fall 2012, G/P/NC – Grade/Pass/No Credit, student-elected grade conversion option*. S/U – Used in courses in which the only evaluations are Satisfactory or Unsatisfactory; S/F – Satisfactory/Failure – designated courses where finer grading distinctions are impractical; H Honors (Health Sciences courses only); Q indicates academic dishonesty and is computed as an F.

*Refer to the appropriate University Bulletin for additional information.

COURSE NUMBERS

Beginning in Fall 1978 an extensive renumbering of undergraduate courses took place to reflect lower- or upper-division levels.

100 – 299 Lower-Division Undergraduate Courses

300 – 499 Upper-Division Undergraduate Courses

500 – 899 Graduate Courses

The symbol # before a course title indicates a topics course whose title may change from term to term.

UNIVERSITY HONORS & DEAN'S LIST

Criteria for graduation with University Honors or for the awarding of Dean's List, refer to the appropriate University Bulletin.

CLASS RANK

Stony Brook University does not calculate rank in class.

This Academic Transcript from Stony Brook University located in Stony Brook, NY is being provided to you by Parchment, Inc. Under provisions of, and subject to, the Family Educational Rights and Privacy Act of 1974, Parchment, Inc is acting on behalf of Stony Brook University in facilitating the delivery of academic transcripts from Stony Brook University to other colleges, universities and third parties.

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COLLEGES, SCHOOLS AND DEGREES OF THE UNIVERSITY**COLLEGE OF ARTS AND SCIENCES**

Bachelor of Arts, Bachelor of Science, Master of Arts, Master of Science, Master of Music, Master of Fine Arts, Master of Philosophy, Doctor of Arts, Doctor of Musical Arts, Doctor of Philosophy

COLLEGE OF ENGINEERING AND APPLIED SCIENCES

Bachelor of Engineering, Bachelor of Science, Master of Science.

Doctor of Philosophy

COLLEGE OF BUSINESS

Bachelor of Science, Master of Business Administration

SCHOOL OF JOURNALISM

Bachelor of Arts, Master of Science

SCHOOL OF MARINE AND ATMOSPHERIC SCIENCES

Bachelor of Science, Bachelor of Arts, Master of Science, Master of Arts, Doctor of Philosophy

SCHOOL OF PROFESSIONAL DEVELOPMENT

Master of Arts in Liberal Studies, Master in Professional Studies, Master of Arts in Teaching, Master of Higher Education Administration, Master of Science Human Resource Management

Please note: The Secondary Education option on an undergraduate degree recipient's academic record indicates completion of a provisional teacher certification program approved and registered by the New York State Education Department.

HEALTH SCIENCES**SCHOOL OF HEALTH TECHNOLOGY AND MANAGEMENT**

Bachelor of Science, Master of Science, Doctor of Physical Therapy

SCHOOL OF DENTAL MEDICINE

Doctor of Dental Surgery, Doctor of Philosophy

SCHOOL OF MEDICINE

Doctor of Medicine, Doctor of Philosophy

SCHOOL OF NURSING

Bachelor of Science, Master of Science, Doctor of Nursing Practice

SCHOOL OF SOCIAL WELFARE

Bachelor of Science, Master of Social Work, Doctor of Philosophy

FAMILY MEDICINE

Master of Science

GRADUATE PROGRAM IN PUBLIC HEALTH

Master of Public Health

HEALTH SCIENCES CALENDAR

Many of the programs in the Health Sciences divides the academic year into five-week sessions and combinations of sessions rather than a 15 week semester. The session terms are designated on students' academic record.



Cornell Law School

EMILY SHERWIN

Frank B. Ingersoll Professor of Law

Cornell Law School
210 Myron Taylor Hall
Ithaca, NY 14853-4901
Phone 607.255.1922 / 607.255.7193 (fax)
E-mail: els36@cornell.edu

May 15, 2023

The Honorable Judith C. McCarthy
United States District Court for the Southern District of New York
Charles L. Brieant, Jr. United States Courthouse
300 Quarropas Street, Room 434
White Plains, NY 10601-4150

Dear Judge McCarthy:

I am writing to recommend Daniel McCarthy as a judicial clerk. Mr. McCarthy was a student in several of my classes. He did consistently well and stood out as a creative, engaged, and hardworking student. I believe he will make a wonderful clerk and I give him my highest recommendation.

Mr. McCarthy is a smart, serious lawyer who has been working to assemble a body of knowledge in the areas of finance, technology, and litigation. I have been impressed by his choice of courses - rather than selecting courses that are likely to boost his GPA, he chose difficult courses that he believes will help him in his career. My Remedies course is an example: it is very helpful for anyone interested in finance or debtor/creditor law, but the subject matter is difficult. Mr. McCarthy worked hard, was a good, thoughtful participant, and did well. I can assure you that he comes with a good working knowledge of constructive trusts, equitable liens, subrogation, and collection priorities -- not easy subjects to master but important to many types of law practice. I am also sure that his fluency in legal practice and argumentation has greatly increased during his year as a litigation associate at the Otterbourg firm.

Mr. McCarthy is also a skillful and creative writer. He drafted a note, which is certainly of publishable quality, on the very interesting topic of self-enforcing contracts. The note addresses how so-called "smart contracts" work, the roles they are likely to play in international trade, and also what effects they might have, positive and negative, on mutual trust in contract settings. It is an excellent piece of work, well-researched, well-written and in my opinion, more intrinsically interesting than many student efforts. Based on this work, I am satisfied that would have no difficulty crafting clear and logical memoranda or draft opinions.

Having known Mr. McCarthy for three years during law school and advised him on his journal note, I also believe he has the ideal temperament for a law clerk. He is deferential, but not too shy to speak up when he has a question or an idea to contribute. He is interested in his work. He is organized: he listens carefully to instructions, then he digs in to the material and does whatever is necessary to come up with a solution. He also budgets his time effectively - despite



The Honorable Judith C. McCarthy
May 15, 2023
Page 2

all the chaos that disrupted legal education and daily life in spring 2020, his request for a clerkship recommendation arrived well in advance of deadlines, with a description of his plans and hopes and clear information about the various changes that have been made in application procedures. Finally, he has a quiet but easy personality that will enable him to work comfortably with all those around him.

In sum, I believe Mr. McCarthy would be a wonderful choice as a law clerk. He will work hard for you, he will do his job well and with interest, and he will be good company. Please feel free to contact me if I can answer any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Emily L. Sherwin". The signature is fluid and cursive, with the first name "Emily" being more prominent and the last name "Sherwin" written in a more compact, stylized manner.

Emily L. Sherwin
Frank B. Ingersoll Professor of Law





STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

DIVISION OF REGIONAL OFFICES
SYRACUSE REGIONAL OFFICE

December 13, 2022

The Honorable Judith C. McCarthy
United States District Court for the Southern District of New York
Charles L. Brieant, Jr. United States Courthouse
300 Quarropas Street, Room 434
White Plains, NY 10601-4150

Re: Reference for Daniel T. McCarthy

Dear Judge McCarthy,

I am writing to provide a letter of recommendation for Daniel McCarthy for a judicial clerkship. I am an Assistant Attorney General for New York State working in the Syracuse, NY office. I am also a professor teaching the New York State Attorney General Practicum at Cornell Law School and an office supervisor for students working at the Office of the Attorney General. During the Spring 2020 semester Daniel was a student in the Practicum course. Daniel was a solid student and strong member of the OAG paraprofessional staff. As discussed below, I base this recommendation on his legal skills, work ethic, professionalism, positive attitude and my coming to know something of Daniel as a person.

Daniel's practicum began in January 2020 as part of an Attorney General course offered at Cornell Law School. The practicum has two components: a traditional in-office supervised work experience, and a companion in-class weekly lecture. To be accepted to the clinic and work within the OAG office, students are required to apply and be accepted for one of a limited number of spots. In reviewing Daniel's application, I was impressed by his academic achievements and work experience, which included solid grades, experience working as a judicial clerk, and internships with both a small legal office and SUNY Stony Brook's General Counsel Office. (SUNY is a primary client of mine and Stony Brook my alma mater.) In interviewing Daniel and challenging him (I knew Stony Brook and SUNY Counsel well), I was impressed by Daniel's responses, but I also became aware that Daniel's background is not that of the typical Cornell student. Daniel is not a child of privilege and is in fact a first-generation law student who has earned his achievements by hard work, intelligence and a willingness to learn and succeed in a profession he has chosen. I don't think this is a minor point

and its value was reinforced as our semester was confronted with the unique challenges of the COVID pandemic.

During the clinical experience I directly assigned Daniel work and supervised those assignments and others he performed for other office attorneys. I have also observed him in the classroom setting where he was prepared and engaged. In the workplace, Daniel arrived timely, demonstrated a strong work ethic and meaningfully was involved in the cases to which he was assigned work.

In following Daniel through the semester, I can vouch for the quality of his work but as one attorney explained to me in discussing Daniel's progress, it was particularly impressive how Daniel built on the early work he performed to add value to assignments he addressed later. Asked by this attorney to research and write several related memorandums, including one on the law of issue preclusion, Daniel was invited later in the semester to participate in a client witness interview – necessary to clarify background facts – on this particularly difficult case. Participating in the interview, Daniel raised some additional questions based on the client witness's responses. This led to the discovery (made by Daniel) that the claimant could not apply the per se negligence rule as anticipated. Daniel shared the relevant cases and this discovery became the center of the now-viable defense of our client, the State of New York.

Daniel's work at the OAG almost exclusively involved areas he had limited experience with. Despite this, Daniel's research, analysis, and writing were of high quality. He was able, from early in the internship, to identify key legal issues and clearly developed his abilities as the clinic continued. His analyses were timely and on point. He is responsible, works well independently, writes clearly, quickly grasps complex legal issues, remains focused on the tasks at hand and shows a mature understanding of the practice of law.

In closing, I wanted to return to the concept that Daniel is not what some of us sometimes imagine when we think Cornell Law student. I mentioned he was a first-generation law student. In coming to know Daniel, I also learned that he was a child of a single parent household, having lost his father when he was young. I think these are factors in his maturity and work ethic, but it also informs how he looks at and practices the law. Daniel has the requisite intellectual heft and training to be successful as a judicial clerk, but it is his work ethic, responsible attitude, and, yes, even empathy that I think make him a value-added candidate. One short story I think is revealing. When COVID hit, many of my students stayed in Ithaca (apartments and the like were paid for) and attended remote classes and remote clinics as required. I took note of the fact Daniel returned home and attended the same things from Long Island. I subsequently learned why he took this path. Daniel's mom is a respiratory therapist and RN; she was called in for overtime and the like as Long Island was hit hard by the virus. Daniel needed to return home to assist in taking care of his grandparents (filling the role his Mom had played while he was at school and things were more normalized). His grandparents were medically compromised in addition to their advanced age, and it was Daniel who took on the burden to shop, cook and deliver food and attend to other needs. I found this out after classes ended, and Daniel communicated about starting his summer position. While the semester was ongoing Daniel attended every class, met all of his clinic commitments and participated fully in the Practicum. I believe this informs who Daniel is, and as importantly, can be. It is one additional reason I recommend him for consideration as a clerk.

I would be pleased to discuss Daniel's performance with you further if it would be of assistance. My direct telephone number is (315) 448-4880 and email is Joseph.Callery@ag.ny.gov. If you have any questions, please feel free to contact me.

Very truly yours,

Joseph D. Callery

Joseph D. Callery
Assistant Attorney General

May 15, 2023



The Honorable Judith C. McCarthy
 United States District Court for the Southern District of New York
 Charles L. Brieant, Jr. United States Courthouse
 300 Quarropas Street, Room 434
 White Plains, NY 10601-4150

Dear Judge McCarthy:

I am writing to recommend Daniel McCarthy for a clerkship in your chambers. Daniel was a student during fall 2019 in my Land Use seminar. He proved himself to be a valuable participant in class discussion. I enjoyed getting to know him over the course of the semester and am delighted to write this letter on his behalf.

Before discussing Daniel's performance in my Land Use class, please allow me to take a moment to explain how I ran the class. The class met once a week, with a different topical focus each week. For each class, I assigned readings from my Land Use casebook in order to provide an overview of the law. I also assigned one or more academic readings that approach the topic from a more theoretical perspective. So the reading was quite heavy. I asked students to write several short papers over the course of the semester—the students got to pick which weeks (and which topics). The papers were based on the readings for the week. I told students to stake out and defend a position on the week's topic or on some aspect of the week's readings. The purpose of the papers (and of my feedback) was to hone the students' persuasive writing skills.

Many students struggled with this format. They tended to want to write descriptive papers that summarize the readings for the week. Daniel initially struggled with the format, but there was a marked improvement over the course of the semester. By the end, he was diving right into the crux of the topic for the week, engaging with the material and staking out a strong position. He earned the highest possible score for the last two of the five papers. In addition to his solid writing, Daniel was consistently well prepared and participated in each class.

Daniel's final paper was perhaps his greatest success in the course. For the first time that year, I had students engage with a local (i.e., Ithaca) land use challenge in their final papers. I suggested a number of topics for them to consider and invited them to generate their own topics, as long as the topics related to the local community in some way. The idea was to get them to dig a bit deeper into the complexity of a local land use challenge, applying the conceptual tools they learned in the class to a concrete problem. Daniel chose to work on the problem of housing affordability in Ithaca. He started off by

PRESIDENT'S OFFICE

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2.

debunking a frequently-made assertion that Ithaca housing is as unaffordable as housing in certain high-growth metropolitan areas. Using Census data, he persuasively argued that the mismatch between Ithaca rents and Ithaca median incomes is a statistical artifact of the large number of students who occupy rental housing in the area. Cornell University students have low reported incomes but often have access to familial financial resources that put Ithaca's more expensive apartments within reach. He did not use this debunking to set the question of affordability to the side, but simply to put some of the more extreme claims made about the Ithaca housing market into the proper context. He then went on to talk about the various features of the Ithaca housing market that tend to depress the supply of affordable housing, most significantly an historic hostility to new housing construction in the City of Ithaca. The paper was both technically sophisticated and elegantly written. I learned a great deal from it, and assigned it the highest score for any final paper in the class.

You might be puzzled by the foregoing, since Daniel nonetheless received an A- in the course. Cornell applies a strict curve, even to seminars. As a result, I typically only awarded one (or sometimes two) straight A grades in a cohort. In this case, because I had an unusually strong group of students, I only awarded one A, in order to be able to award a more A- grades. Daniel's A- put him among the top four students in the class that semester.

In sum, I think Daniel has all the makings of a very fine law clerk, and I have no hesitation recommending him. He is smart and hard working. He has a respectful and thoughtful demeanor that would be a pleasure to have in any chambers. I hope you will give him a very close look. If you have any questions, please do not hesitate to get in touch.

Respectfully,



Eduardo M. Peñalver
Seattle University President
Former Allan R. Tessler Dean and Professor of Law at Cornell Law School

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May 1, 2023

The Honorable Judith C. McCarthy
United States District Court for the Southern District of New York
Charles L. Brieant, Jr. United States Courthouse
300 Quarropas Street, Room 434
White Plains, NY 10601-4150

Re: Daniel T. McCarthy

Judge McCarthy:

It is my distinct pleasure to recommend Daniel T. McCarthy for a clerkship in Your Honor's chambers. I do so with only one reservation — that being the potential loss of Daniel as an invaluable asset to our firm, Otterbourg P.C. It is my sincere hope that this letter will adequately convey to Your Honor how highly I think of Daniel as an attorney and a person. Quite simply, he is one of the finest young attorneys I have worked with in my career which began in 2001, and has included tenures at a large international firm in New York, two smaller firms in Miami, and since 2007, Otterbourg, a full service, midsize firm in New York.

I first met Daniel in connection with my role as the co-chair of Otterbourg's summer associate committee, a role I have held for over seven years. During that time, I have reviewed nearly every resume that our firm has received, and interviewed every candidate receiving a call back interview, as well as a substantial portion of those who did not. Although we are a smaller firm by New York City standards, we traditionally hire three summer associates. As a result, our hiring process is exceedingly rigorous and competitive. During the hiring season, we review hundreds of resumes. We typically interview students from between six to eight preeminent law schools, focusing on the top law schools in New York, including Cornell, Fordham, and Columbia. We conduct around 200 screening interviews, and then meet with between ten and twenty law students for half-day long call back interviews. Daniel immediately stood out during this process, and we were elated when he accepted our offer to become a summer associate.

The following specific examples of Daniel's work that I have directly supervised highlight the characteristics which I believe Your Honor will find most beneficial to Daniel as a clerk. I have chosen these examples because the proverbial "fly on the wall" at Otterbourg during our work on these matters would have been hard-pressed to distinguish between Daniel as a junior associate and other far more experienced attorneys. This is due to Daniel's outstanding research abilities, command of the material, and most importantly, willingness and ability to challenge, in a professional and mature manner, the conclusions and strategies of the more seasoned attorneys on



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 Hon. Judith C. McCarthy
 Page 2

a given team. Daniel has proven himself capable of, and is therefore often called upon to, perform tasks typically reserved for more senior attorneys. His competence and skills have consistently surpassed expectations. Daniel has, among other matters:

- Drafted a brief (which was only minimally edited by partners before filing) on behalf of a federal equity receiver. This brief helped avoid wasteful and invasive discovery sought by certain defendants from the receiver. Daniel worked independently, researching and drafting the entire brief with incredible attention to detail and clarity, reducing a complicated legal issue to a simple, yet persuasive formulation. The Court ruled in our favor;
- Regularly conducted telephonic and video conferences with clients, opposing counsel, co-counsel, experts such as financial advisors, third-parties and regulators without supervision by or the participation of, senior attorneys. This demonstrates our faith in Daniel's interpersonal, collaboration and communication skills. By way of example, Daniel recently completed a hearing preparation session with governmental counsel solo when I had to leave the meeting early to attend to another matter;
- Immediately immersed himself when an emergency arose — as it often does when most attorneys have left the office for the evening — in a previously existing matter on which he had not worked previously (the assigned associate was unavailable). Daniel worked by my side in a conference room throughout the night into the early morning, learning the facts, conducting thorough legal research, drafting papers, strategizing, and ensuring that our response was procedurally sound. Our responsive papers were timely filed the next morning before two different courts, including the New York State Court of Appeals.

Shortly thereafter, the Court of Appeals requested a full briefing on the issue. It was clear to me after our initial strategy meeting that Daniel had developed a clear understanding of the facts and a theory of why our position was correct. He then prepared the first draft of our brief, and I was not surprised when, typical of Daniel's work, the facts were meticulously presented, the law clearly explained, and the analysis compelling. The brief required only minimal edits prior to submission. Thanks in no small part to Daniel's work, the New York Court of Appeals ruled in our favor;

- Developed creative solutions which have improved our efficiency and allowed us to focus our time where it can be better spent. One example stands out amongst many: In one case, we needed to reconstruct transaction records for a set of funds which had not kept centralized or reliable records of the transactions at issue. Forensic financial analysts provided us with an estimate that it could take as long as six months to manually reconstruct



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Hon. Judith C. McCarthy
Page 3

the records, which was far too long (and expensive). Thankfully, Daniel recognized a pattern in the documents which, if reconstructed using an algorithm, would yield the same information that the analysts would have spent months recreating manually. He proposed this solution to the team and we approved its implementation since we were aware of Daniel's previous successes in applying his knowledge of computer science to legal matters.

Within a few days, he deployed his algorithm which parsed an enormous volume of data, creating a useful database in a fraction of the time it would have taken through manual review. This innovative approach saved a significant amount of time. Daniel's creativity allowed us to direct limited resources to better uses.

In conclusion, I hope that the foregoing examples convey a portrait of a young, but experienced attorney who possesses a unique combination of legal expertise, innovative thinking and grace under pressure. These qualities would allow him to excel as a law clerk and become an indispensable member of Your Honor's chambers, just as he has become an indispensable part of my firm. I would be happy to address any questions that Your Honor may have as to Daniel's candidacy.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "E. Weinick", written in a cursive style.

Erik B. Weinick

DANIEL T. MCCARTHY

3 Court Square Apt. 809 | Long Island City, NY 11101 | (631) 332-1750 | dtm222@cornell.edu

Writing Sample

Dear Judge McCarthy:


Attached is a memorandum of law that I drafted independently. The memorandum was filed in a civil enforcement action brought by the Securities and Exchange Commission with only minor edits by partners.

My firm was retained by the receiver for several related private investment funds. The Securities and Exchange Commission brought a civil enforcement action against the funds and their former principals, alleging that they violated securities laws. The Government moved to intervene in the civil enforcement action, seeking a complete stay of discovery to avoid prejudice to an ongoing criminal investigation involving the same facts as those at issue in the civil enforcement action.

The former principals of the private investment funds opposed the stay. In their opposition, they also sought an order that would permit them to seek discovery from the receiver of the private investment funds. The memorandum of law that follows this cover page presents the receiver's argument why the Court should deny the former principals' request for an order allowing them to seek discovery from the receiver.

The Court denied the former principals' request for an order allowing them to seek discovery from the receiver.

Respectfully,


Daniel T. McCarthy

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X	
SECURITIES AND EXCHANGE COMMISSION,	:
	:
Plaintiff,	:
	:
-v-	:
	No. 1:22-cv-03897-LAK
	:
STRAIGHTPATH VENTURE PARTNERS LLC,	:
STRAIGHTPATH MANAGEMENT LLC,	:
BRIAN K. MARTINSEN,	:
MICHAEL A. CASTILLERO,	:
FRANCINE A. LANAIA, and	:
ERIC D. LACHOW,	:
	:
Defendants.	:
-----X	

**THE RECEIVER’S RESPONSE TO THE
INDIVIDUAL DEFENDANTS’ MEMORANDUM OF LAW IN
OPPOSITION TO THE GOVERNMENT’S APPLICATION FOR A COMPLETE STAY**

OTTERBOURG P.C.
230 Park Avenue
New York, NY 10169
(212) 661-9100

Attorneys for Melanie L. Cyganowski, as Receiver

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Melanie L. Cyganowski, as receiver (the “**Receiver**”) for StraightPath Venture Partners LLC, StraightPath Management LLC (collectively, the “**Corporate Defendants**”), and the SP Funds¹ (collectively, the “**Receivership Entities**”), by her undersigned counsel, hereby responds to the Memorandum of Law in Opposition to the Government’s Application for a Complete Stay (the “**Opposition**,” Dkt. No. 136), submitted by Defendants Brian K. Martinsen, Francine A. Lanaia, and Michael A. Castillero (collectively, the “**Individual Defendants**” or “**IDs**”). For the reasons set forth herein, the relief sought in the Opposition should be denied.

PRELIMINARY STATEMENT

The Court should deny the IDs’ request for wholesale and impalpably improper discovery of the Receiver’s deliberative processes in fulfilling her obligations under the Receivership Order, Dkt. No. 56. The discovery the IDs seek is highly invasive and is nothing less than a virtual seat at the Receiver’s conference room table.

In sum, the relief which the IDs seek should be rejected for three reasons:

1. ***A court-appointed receiver shares in the appointing court’s absolute immunity from discovery.*** The IDs point to no authority which would entitle them to the relief they seek.
2. ***The IDs do not have a “bargained-for” right to the discovery they seek.*** This Court never granted the IDs a “bargained-for” right to their unprecedented effort to investigate the Receiver. None of the sources to which the IDs cite in support of that purported right grant the IDs that right.
3. ***The relief sought by the IDs runs afoul of Local Rule 7.1 in that it is a motion or cross-motion disguised as an opposition.*** As such, if the Court elects to consider the relief at all, it should be considered only as a stand-alone motion to which the Receiver should have an opportunity to respond in full.

¹ The “**SP Funds**” refer to SP Ventures Fund LLC, SP Ventures Fund 2 LLC, SP Ventures Fund 3 LLC, SP Ventures Fund 4 LLC, SP Ventures Fund 5 LLC, SP Ventures Fund 6 LLC, SP Ventures Fund 7 LLC, SP Ventures Fund 8 LLC, and SP Ventures Fund 9 LLC.

The discovery which the IDs seek from the Receiver includes, among other equally broad demands, all documents concerning the Receiver’s exercise of her “rights, duties, and obligations” on a range of topics under the Receivership Order (Revised Document Requests ¶ 1, Dkt. No. 136-2), all documents the Receiver relied upon in preparing her status reports to the Court (and in preparing any “calculations” not included in such reports) (Revised Document Requests ¶¶ 4, 7), and the contact information of every person with whom the Receiver communicated regarding the Receivership and a description of the subject matter of those communications (Revised Interrogatories ¶ 6, Dkt. No. 136-2). None of this discovery arises from a motion or other request for relief the Receiver has sought from the Court. It is simply an attempt by the IDs to investigate the Receiver’s investigation and discharge of her other duties under the Receivership Order.

Allowing such discovery from a court-appointed receiver would chill a receiver’s deliberative processes in carrying out court orders. Such a right is as fictitious as it is dangerous, and the Court should reject it on the merits. However, if it does not, it should require the IDs to refile their request for an order on notice of motion or through an order to show cause pursuant to Local Civil Rule 7.1, subject to the Receiver’s right to object to the IDs’ discovery requests.

ARGUMENT

I. THE INDIVIDUAL DEFENDANTS ARE NOT ENTITLED TO DISCOVERY OF THE RECEIVER’S QUASI-JUDICIAL FUNCTIONS

The IDs cite no authority for their claim that they are entitled to discovery from a court-appointed receiver. This is because a court-appointed receiver, while acting within the scope of her authority pursuant to a court order, shares in the appointing court’s absolute immunity from discovery.

The Receiver is an “arm of the court,” and so long as she does not act “in the clear absence of all jurisdiction,” shares in the Court’s immunity. *Bank of Am., N.A. v. New York Merchants*

Protective Co., No. 11-cv-38 (DRH) (ARL), 2012 WL 2790346, at *3 (E.D.N.Y. July 9, 2012); *Lally v. Leff*, No. 17-cv-4291 (JFB) (SIL), 2018 WL 4445152, at *4 (E.D.N.Y. Sept. 18, 2018) (quoting *Finn v. Anderson*, 592 F. App'x 16, 19 (2d Cir. 2014)) (receiver held immune from suit where allegations against receiver related to actions she took pursuant to mandate as receiver).

This immunity extends to discovery demands. In *Fed. Trade Comm'n ex rel. Yost v. Educare Ctr. Servs., Inc.*, the court held that a receiver, as a quasi-judicial official, was immune from a party's subpoena for documents and communications arising from the receiver's judicial functions. No. EP-19-cv-196 (KC), 2020 WL 4334765, at *3 (W.D. Tex. May 26, 2020). Similarly, in *McCoy v. Belmont*, the court held that a party which claimed it could not "attack the validity of [a] master's report without information about how the report [was] produced," could not obtain that information from the master without first meeting its burden of establishing "extreme and extraordinary circumstances." No. 3:85-cv-465 (JGM), 1999 WL 33117446, at *1–2 (D. Conn. Aug. 9, 1999) (quoting *Gary W. v. State of La., Dep't of Health & Hum. Res.*, 861 F.2d 1366, 1369 (5th Cir. 1988)).

As in *Yost*, the information the IDs seek is that which the Receiver has acquired solely pursuant to her discharge of her duties under the Receivership Order. In *Yost*, the appointment order defined the receiver's duties to include "obtain[ing] possession of relevant documents." No. EP-19-cv-196 (KC), 2020 WL 4334765, at *2 (W.D. Tex. May 26, 2020). Likewise, here, the Receivership Order charges the Receiver with the duty to "take custody, control, and possession of all Receivership Property, and records relevant thereto . . . [and] take into possession from third parties all Receivership Property and records relevant thereto" Receivership Order 4–5. The Receiver would not possess the information the IDs seek but for the discharge of her Court-ordered duties.

The discovery which the IDs seek from the Receiver is even broader than that sought in *Yost*. The subpoena in *Yost* sought, among other things, documents and transcripts from interviews, bank statements, and payment processing records. *Id.* at *2. Since the appointment order required that receiver to collect those documents, the receiver’s collection of those materials fell within the scope of the receiver’s court-appointed role, and thus the receiver shared in the court’s immunity from discovery of those materials. *Id.* However, here, the IDs seek more than documents collected by the Receiver—they seek documents that clearly reflect the Receiver’s deliberative processes in carrying out her duties. *E.g.*, Revised Document Requests ¶ 9(ii) (documents relating to analysis of commingling); Revised Document Requests ¶ 9(iv) (documents relating to evaluation of a claims process); Revised Interrogatories ¶ 6 (description of subject matter and provision of contact information for those with whom the Receiver has spoken); Document Requests ¶ 1 (documents concerning Receiver’s exercise of “rights, duties, and obligations” on a range of topics).

The IDs cannot establish that “extreme and extraordinary circumstances” exist, necessary to justify invading a quasi-judicial officer’s functions, and they do not even attempt to do so. *McCoy*, 1999 WL 33117446, at *2 (quoting *Gary W.*, 861 F.2d at 1369); *cf. Lally*, 2018 WL 4445152, at *4 (receiver immune from suit where she did not act “in the clear absence of all jurisdiction”). Just as the propounding party in *McCoy* argued, the IDs argue here that they cannot “challenge . . . determinations by the Receiver” without “the information needed to determine if a challenge is necessary.” Opposition 16.² But the mere desire to challenge the Receiver’s

² It would not matter if, for example, the IDs sought discovery from the Receiver merely to verify that the figures in her status reports were accurate rather than to support a challenge to her exercise of her quasi-judicial functions; even supposedly factual discovery requests may “invade[] upon an official’s good-faith decision-making prerogative.” *Yost*, 2020 WL 4334765, at *3 (quoting *United States v. Edwards*, 39 F. Supp. 692, 706 (M.D. La. 1999)).

determinations is neither extreme nor extraordinary. *Cf. McCoy*, 1999 WL 33117446, at *1–2 (rejecting motion to seek discovery from special master even though plaintiff could not “attack the validity of the master’s report without information about how the report [was] produced”).

Moreover, it would set a dangerous precedent if the IDs were permitted to obtain highly invasive discovery of the Receiver’s discharge of the Court’s directives—particularly, discovery unrelated to any relief the Receiver seeks from the Court. As the Supreme Court explained in *Forrester v. White*, concerning a request to depose the Secretary of Agriculture, the rationale of granting immunity to those carrying out judicial functions is “justified by overriding considerations of public policy.” 484 U.S. 219, 224 (1988); *see also United States v. Morgan*, 313 U.S. 409, 421–22 (1941) (cleaned up) (trial court erred in permitting deposition of Secretary of Agriculture because “proceeding has a quality resembling that of a judicial proceeding [and] just as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected”). If, like the IDs, parties could, for example, learn the identity of every person with whom a receiver communicated and learn the subject matter of those communications (*e.g.*, Revised Interrogatories ¶ 6), the potential for such disclosure would tend to chill a receiver’s ability to carry out court orders, particularly those in which a court entrusts the receiver to use her discretion to decide how to best implement its mandates. *E.g.*, Receivership Order 4, 14–16.

Critically, the IDs concede they are seeking discovery from the Receiver for the purpose of invading her deliberative processes in carrying out the Receivership Order. The Opposition states that the IDs must obtain discovery to ensure they are able to “help serve the investor’s interest [*sic*] through inquiry and verification of the Receiver’s work and, if necessary, putting the Receiver to task” Opposition 19. Such claimed inability to verify the Receiver’s work is an undisguised attempt to investigate and stand in review of the Receiver’s work—hardly the sort of

“extreme and extraordinary circumstance” necessary to justify invading the Receiver’s deliberative processes.³ See *McCoy*, 1999 WL 33117446, at *1–2 (inability to “attack the validity of the master’s report without information about how the report [was] produced” not “extreme and extraordinary circumstance[]”).

Moreover, the IDs provided the Receiver with the bulk of the materials she is relying upon to carry out the Receivership Order. The IDs’ requests thus do not simply call for the turnover of these same materials which the IDs already possess; the requests instead seek to understand *how* these materials have factored into the Receiver’s deliberation. In sum, the IDs have pointed to nothing extreme nor extraordinary which would entitle them to discovery.

II. THE INDIVIDUAL DEFENDANTS HAVE NO “BARGAINED-FOR” RIGHT TO DISCOVERY FROM THE RECEIVER

The IDs claim various “bargained-for” rights, including the right to seek discovery from the Receiver. However, the sources relied on by the IDs do not grant them such a right.

A. The Receivership Order Does Not Grant a Right to Discovery from the Receiver

The first apparent source of the IDs’ claimed right to discovery from the Receiver is the Receivership Order itself. However, the Receivership Order grants no such right.⁴ Instead, the IDs attempt to divine this additional right from their right to “assess and potentially object to the

³ It is far from evident why the same defendants who consented to the imposition of a remedy against “the company they worked at for years” (Opposition 18) should have any special right to oversee the Receiver’s implementation of that company’s receivership. See *Fed. Home Loan Mortg. Corp. v. Spark Tarrytown, Inc.*, 829 F. Supp. 82, 85 (S.D.N.Y. 1993) (citing *Jamaica Savings Bank v. Florizal Realty Corp.*, 95 Misc. 2d 654, 407 N.Y.S.2d 1016, 1018 (Sup. Ct. Queens Cnty. 1978)) (holding that a receiver is solely an arm of the court, not the agent of the party who sought her appointment).

⁴ The Receivership Order’s omission of any authority for the IDs to take discovery from the Receiver was not an oversight. The Receivership Order specifically provided the Receiver with the right to take discovery under certain circumstances from the IDs (Receivership Order 7–8). However, no reciprocal “bargained-for” right entitling the IDs to take discovery from the Receiver is present in the Receivership Order. If the Receivership Order actually provided the IDs a right to discovery, that right would exist—expressly—in the text of the Receivership Order. Just as the Receivership Order specifically provided the IDs the right to oppose the Receiver’s waiver of pre-appointment privileged materials (Receivership Order 6), it likewise could have provided for a right to discovery from the Receiver.

Receiver's distribution plan, and further to determine and challenge whether the Receivership should remain in place at all." *See* Opposition 13. Whether the IDs have any right to seek discovery from the Receiver (subject to the Receiver's right to object) in response to a motion or other relief sought by the Receiver is not before the Court. Moreover, the Receivership Order does not *even* confer upon the IDs any rights to "object to the Receiver's distribution plan" or "challenge whether the Receivership should remain in place at all." The Receivership Order merely acknowledges that the IDs have not waived such rights by acceding to the imposition of the Receivership Order. Receivership Order 2 ("the parties have agreed . . . to the following terms concerning the appointment of a receiver . . . without any waiver of the IDs' . . . rights to later seek to modify, vacate, or terminate the receiver's appointment or to challenge the appropriateness of any actions by the receiver"); Receivership Order 21 ("Nothing . . . shall be construed to prevent the IDs from filing or opposing any motions concerning the receivership or any actions or omissions by the Receiver."). The IDs thus have no "right to *continue* to engage with the Receiver, including . . . [by] seeking documents and information regarding the Receiver's administration of the Receivership Estate" (Opposition 6 (emphasis added)), since they never had such a right.

B. The Side Letter Agreement Does Not Grant a Right to Discovery from the Receiver

The IDs' imply that a "side letter" agreement between the IDs and the SEC supports their right to discovery from the Receiver. Opposition 9. That letter is not incorporated in or referenced by the Receivership Order. A right purportedly conferred from a side letter agreement between the SEC and the IDs does not bind the Court. *Cf. Harris v. U.S.*, 380 F. Supp. 2d 278, 285 n.6 (S.D.N.Y. 2005) ("A plea agreement is a contractual agreement between the Government and the defendant to which the Court is not a party. The Court cannot breach an agreement to which it is not a party.").

Moreover, whatever effect the side letter might have, the Receiver was not a party to this pre-receivership document, and it does not bind her either. *See Wahrsager v. NMP Holdings Corp.*, No. 11-cv-4637 (DRH) (ARL), 2012 WL 1118640, at *3 (E.D.N.Y. Mar. 31, 2012) (citing Ralph Ewing Clark, *A Treatise on the Law and Practice of Receivers* § 561.1 (3d ed. 1992) (“[T]he general rule [is] that an equity receiver is not responsible for contracts entered into by the defendant prior to the receiver’s appointment, unless the receiver later affirmatively ratifies that contract.”)).

C. The Scheduling Order Does Not Grant a Right to Discovery from the Receiver

The IDs appear to imply that under the Proposed Scheduling Order (Dkt. No. 97), the Receiver is a “Party” from whom the IDs may seek discovery. *See* Opposition 5–6, 15 n.8; Revised Document Requests 1; Revised Interrogatories 1. The IDs are mistaken.

The Proposed Scheduling Order defined “Parties” to include only the IDs and the SEC. Proposed Scheduling Order 1. However, the Receiver, “on behalf of the Corporate Defendants,” was to be treated as a Party solely for discovery related to the Action that either the SEC or the IDs sought “*from the Corporate Defendants.*” Proposed Scheduling Order ¶ 19 (emphasis added). Thus, if the IDs seek discovery from the Corporate Defendants relating to the Action, the Receiver will respond for them.⁵ Here, the IDs are not seeking discovery *from* the Corporate Defendants; they are seeking discovery *from* the Receiver.⁶ The Proposed Scheduling Order does not support the IDs’ demand for discovery from the Receiver.

⁵ The Proposed Scheduling Order’s exclusion of the Receiver from the definition of “Parties” (Proposed Scheduling Order 1) would be meaningless if Paragraph 19 of the Proposed Scheduling Order meant that the Receiver is a Party.

⁶ Despite the IDs’ assertion that “[t]here are effectively three parties in this case (the SEC, the Individual Defendants, and the Receiver)” (Opposition 18), the Receiver is *not* a party to this action and is not required to respond to requests for production pursuant to Fed. R. Civ. P. 26 and 34 nor to interrogatories pursuant to Fed. R. Civ. P. 26 and 33.

III. THE INDIVIDUAL DEFENDANTS’ MOTION VIOLATES LOCAL CIVIL RULE 7.1

In their Opposition, the IDs seek relief against the Receiver. They can only obtain that relief by making a motion in accordance with Local Civil Rule 7.1. Local Civil Rule 7.1(a)(1) requires that motions be brought by notice of motion or by order to show cause.⁷ “A motion is . . . ‘[a] written or oral application requesting a court to make a specified ruling or order.’” *Knickerbocker v. Artuz*, 198 F. Supp. 2d 415, 417 (S.D.N.Y. 2002) (quoting *Motion*, BLACK’S LAW DICTIONARY (7th ed. 1999)); accord *Motion*, BLACK’S LAW DICTIONARY (11th ed. 2019). Here, “[t]he IDs request an Order providing them the right to continue to engage with the Receiver as set forth in the points above, including allowing the IDs the right to seek the discovery attached [to the Opposition]” Opposition 7. The IDs have sought an order through a written application but have failed to comply with Local Civil Rule 7.1, to the Receiver’s prejudice.

Courts regularly reject procedurally improper motions made via opposition papers. *E.g.*, *Hart v. BHH, LLC*, No. 15-cv-4804, 2018 WL 3471813, at *3 (S.D.N.Y. July 19, 2018); *Correction Officers Benev. Ass’n of Rockland Cnty. v. Kralik*, No. 04-cv-2199 (PGG), 2011 WL 1236135, at *1 n.2 (S.D.N.Y. Mar. 30, 2011); *Sbarra v. Port Auth. of New York & New Jersey*, No. 10-cv-8580 (CM), 2011 WL 4344078, at *8 (S.D.N.Y. Sept. 9, 2011). If the Court does not reach the merits of the IDs’ motion now, it should require the IDs to seek an order pursuant to Local Civil Rule 7.1 such that the Receiver has a full opportunity to respond.

CONCLUSION

The IDs have no right to seek discovery from the Receiver to determine how effectively she is implementing the mandates of the Court, just as they would not be entitled to seek discovery

⁷ Local Civil Rule 7.1(a) makes an exception for letter motions which are permitted by Local Civil Rule 7.1(d). Local Civil Rule 7.1(d) is not applicable to the Opposition, since it is not a letter motion.

against any other entity carrying out a judicial function to evaluate how well they were carrying out that function.

For the reasons set forth herein, the relief sought by the IDs should be denied.

Dated: New York, New York
January 6, 2023

OTTERBOURG P.C.

By: /s/ Erik B. Weinick
Erik B. Weinick
Peter Feldman
Michael A. Pantzer
Daniel T. McCarthy

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eweinick@otterbourg.com

*Attorneys for Melanie L. Cyganowski, as
Receiver*

Applicant Details

First Name **William**
 Middle Initial **N**
 Last Name **Mercier**
 Citizenship Status **U. S. Citizen**
 Email Address willm1006@gmail.com

Address

Address Street 1000 Conestoga Road, Apt. A316, City Bryn Mawr State/Territory Pennsylvania Zip 19010 Country United States

Contact Phone Number **2035221514**

Applicant Education

BA/BS From **Boston College**
 Date of BA/BS **May 2020**
 JD/LLB From **Villanova University School of Law**
http://www.nalplawsonline.org/ndlsdir_search_results.asp?lscd=23906&yr=2010
 Date of JD/LLB **May 20, 2023**
 Class Rank **10%**
 Law Review/Journal **Yes**
 Journal(s) **Villanova Law Review**
 Moot Court Experience **No**

Bar Admission

Prior Judicial Experience

Judicial
Internships/ **No**
Externships
Post-graduate
Judicial Law **No**
Clerk

Specialized Work Experience

Recommenders

Chanenson, Steve
chanenson@law.villanova.edu
Samahon, Tuan
samahon@law.villanova.edu
(610) 519-7088
Moreland, Michael
moreland@law.villanova.edu
(610) 519-3297

References

Benjamin Wilkoff
bwilkoff@cozen.com

Brenner Fissell
Brenner.Fissell@law.villanova.edu

**This applicant has certified that all data entered in this profile and
any application documents are true and correct.**

1000 Conestoga Road
Apt. A316
Bryn Mawr, PA 19010

May 5, 2023

The Honorable Judith C. McCarthy
The Hon. Charles L. Brieant Jr. Federal Building and Courthouse
300 Quarropas Street
White Plains, NY 10601

Dear Judge McCarthy:

I am a graduating third-year student at Villanova University Charles Widger School of Law where I served as the Managing Editor of Production of the *Villanova Law Review*. I am writing to apply for a clerkship in your chambers for the 2024-2025 term; I would also be interested in the two-year clerkship opening. Following graduation, I will practice for a year as a litigator, and I would then relish the opportunity to serve as a law clerk and see the workings of a federal court up close.

My experience thus far has prepared me for a clerkship. After my 1L year, I took a summer course in constitutional interpretation, and I concurrently worked as a research assistant. During law school, I have completed externships at the Delaware County, Pennsylvania District Attorney's Office and the Foundation for Individual Rights and Expression. Through these positions, I have continued to refine my legal research and writing skills, and I have been exposed to the litigation process in both the civil and criminal arenas. As a Summer Associate in Cozen O'Connor's Philadelphia office, I drafted motions and wrote memoranda on various legal issues. I have accepted a return offer, and I plan to begin as an Associate at Cozen in September 2023. Also, I have taken a course load of relevant electives including Federal Courts, Administrative Law, Federal Sentencing, and a judicial clerkships practical writing course, taught by Hon. Joel Slomsky of the Eastern District of Pennsylvania, where I drafted four different opinions to practice effective judicial opinion writing.

My application materials are attached for your review. The writing sample provided is a brief I prepared for my Legal Writing course. Also, Professors Tuan Samahon, Steve Chanenson, and Michael Moreland have each provided a letter of recommendation on my behalf.

Thank you for your consideration. I would appreciate the opportunity to discuss my qualifications and interests with you further.

Respectfully,

William Mercier

William Mercier

18 Glen Hollow Drive, Monroe, CT 06468 wmercier@law.villanova.edu (203) 522-1514

EDUCATION

Villanova University Charles Widger School of Law, Villanova, PA

Juris Doctor, May 2023

G.P.A. 3.80 (Rank: 11/162), *Magna Cum Laude*, Order of the Coif

Activities & Honors: *Villanova Law Review* – Managing Editor of Production; Dean’s Merit Scholarship Recipient; National Trial Team – Member (Outstanding First-Year Member Recipient; Outstanding Brief Award Recipient at South Texas Mock Trial Challenge)

Boston College Morrissey College of Arts & Sciences, Chestnut Hill, MA

Bachelor of Arts, Major in Political Science, Minor in History, May 2020

G.P.A. 3.587

Activities: Boston College Mock Trial Team – Treasurer and Captain; BC Intramurals – Referee

EXPERIENCE

Cozen O’Connor, Philadelphia, PA

Summer Associate, May 2022 – July 2022, Return Offer Accepted

- Conducted legal research and drafted memoranda and motions on topics including products liability law, spoliation, contractual duties of good faith, and defamation

Foundation for Individual Rights and Expression, Philadelphia, PA

Litigation Intern, September 2022 – December 2022

- Researched First Amendment issues for litigation and internal memoranda
- Cite-checked motions and appellate briefs in preparation for court filing

Delaware County District Attorney’s Office, Media, PA

Certified Legal Intern, January 2022 – April 2022

- Represented the Commonwealth of Pennsylvania during preliminary hearings

George Mason University Liberty & Law Center, Arlington, VA

Intern, June 2021 – August 2021

- Research topics included the intersection of the First Amendment and the advancement of social movements, as well as the criminal prosecution of nonprofit organizations

The Fund for American Studies, Washington, DC

Legal Fellow, May 2021 – July 2021

- Engaged in roundtable discussions with prominent legal scholars and federal judges
- Completed in a course in constitutional interpretation through George Mason University’s Antonin Scalia Law School

Office of Massachusetts Governor Charlie Baker, Boston, MA

Constituent Services Intern, January 2019 – May 2019

- Fielded constituent phone calls and assisted in casework with state government agencies

INTERESTS & HOBBIES

Hiking, Movies, Electoral Politics, *Survivor*, Volleyball, Guitar

**VILLANOVA UNIVERSITY CHARLES WIDGER
SCHOOL OF LAW
Office of the Registrar**

Inquiries may be addressed to:
Office of the Registrar
Villanova University Charles Widger School of Law
299 North Spring Mill Road
Villanova, PA 19085-1682
Telephone: (610) 519-7017

**JURIS DOCTOR PROGRAM
Academic Years 2000-01 to Present
Graduate Tax Program Academic Years 2008-09 to Present**

	Grade	(Quality Points)
A	Excellent	4.00
A-		3.67
B+	Outstanding	3.33
B	Very Good	3.00
B-		2.67
C+	Good	2.33
C	Satisfactory	2.00
C-	Marginally Satisfactory	1.67
D	Unsatisfactory	1.00
F	Failure	<1.00

These grades included in Earned Hours Only:

P	Pass assigned in Pass/Fail Courses
(Grade)&	Grade assigned in a Villanova MBA or Graduate Tax Program Course
*(Grade)	Grade assigned in a Villanova MBA or Graduate Tax Program Course (Used prior to Fall 1999)

These grades are not included in compilation of cumulative figures:

F#	Failure assigned in Pass/Fail Courses
AU	Audit
H	Honors for JD Externship
IP	In Progress
NC	No Credit
W	Approved Withdrawal without Penalty
WP	Withdrawal with Penalty
WX	Approved Withdrawal without Penalty

**GRADUATE TAX PROGRAM
ACADEMIC YEARS 2000-01 TO 2007-08**

	Grade	(Quality Points)
A	Excellent	4.00
B+	Outstanding	3.50
B	Very Good	3.00
C+	Good	2.50
C	Satisfactory	2.00
C-	Marginally Satisfactory	1.75
D	Unsatisfactory	1.00
F	Failure	None

These grades included in Earned Hours Only:

P	Pass assigned in Pass/Fail Courses
XG	Re-examination of previously failed course: computed as "D" for GPA

These grades are not included in compilation of cumulative figures:

F#	Failure assigned in Pass/Fail Courses
AU	Audit
WX	Approved withdrawal without penalty

EXPLANATION OF GRADING SYSTEM ACADEMIC YEARS PRIOR TO 2000-01

GRADING SCALE FOR ACADEMIC YEARS 1980-81 TO 1999-00			GRADING SCALE FOR ACADEMIC YEARS 1971-72 TO 1979-80			GRADING SCALE FOR ACADEMIC YEARS 1965-66 TO 1970-71			GRADING SCALE FOR ACADEMIC YEARS 1953-54 TO 1964-65		
A	Excellent	4.00	A	Superior	4.00	A	Superior	4.00	A	90-100	
B+	Outstanding	3.50	B	Very Good	3.00	B	Very Good	3.00	B	80-89	
B	Very Good	3.00	C+	Good	2.50	C+	Good	2.50			
C+	Good	2.50	C	Satisfactory	2.00	C	Satisfactory	2.00	C	70-79	
C	Satisfactory	2.00	C-	Marginally Satisfactory	1.75	D	Unsatisfactory	1.00	D	60-69	
C-	Marginally Satisfactory	1.75				F	Failure	None	F	Below 60	
D	Unsatisfactory	1.00	D	Unsatisfactory	1.00						
F	Failure	None	F	Failure	None						

Students in the JD/MBA joint degree program will show grades for credits earned in the MBA component of the program. Any course listed with "MBA" in the instructor field is not considered for satisfaction of requirements, or calculated in the GPA, for the JD degree.

ACADEMIC YEARS

2000-01: In the academic year 2000-01 the A- and B- grades were added. Grade equivalents were changed and are reflected above.

1980-81: In the academic year 1980-81 the B+ grade was added. This grade is equivalent to 3.50, and is described as Outstanding.

1971-72: In the academic year 1971-72 the C- grade was added. This grade is equivalent to 1.75 and is described as Marginally Satisfactory.

1965-66: Except for the classes entering prior to September 1965, which remained on the numerical system described below, the grading scale changed to a letter system.

1953-54 to 1964-65: For the classes entering before September 1965 the grading was purely numerical, the passing grade being 60 with an average of 70 required for continuance and advancement in the school.

Only Villanova credits are computed into the cumulative average. Transfer credits from other institutions are shown under the heading "Transfer Credits" and are included in the "Earned Hour" figure only.

In recognition of its judgment that a student with, for example, nine grades of "A" and one grade of "B+" should not be considered as having other than an "A" average, even though his grade point average would be less than 4.00, the faculty has published its conception of the comparative quality of a student's performance based on his grade point average of:

3.83 to 4.00 to represent an "A"	2.50 to 2.82 to represent a "B-"
3.50 to 3.82 to represent an "A-"	2.17 to 2.49 to represent a "C+"
3.17 to 3.49 to represent a "B+"	1.83 to 2.16 to represent a "C"
2.83 to 3.16 to represent a "B"	1.50 to 1.82 to represent a "C-"

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BOSTON COLLEGE

Office of Student Services
Academic Transcript

Boston College
Office of Student Services
Lyons Hall 103
140 Commonwealth Avenue
Chestnut Hill, MA 02467

NAME: WILLIAM NORMAND MERCIER II
SCHOOL: MORRISSEY COLLEGE OF ARTS AND SCIENCES
DEGREE: BACHELOR OF ARTS 05/18/2020
MAJOR: POLITICAL SCIENCE
MINOR: HISTORY

STUDENT ID#: 19093983
DATE PRINTED: 02/03/2022

PAGE: 1 OF 2

ADVANCED PLACEMENT

ENGL1004 ENGLISH CORE EQV:WRITING
ENGL1005 ENG CORE EQVIV:LITERATURE
HIST1071 HISTORY CORE I EQUIV
HIST1075 HISTORY CORE II EQUIV
HSXX1076 AMERICAN HISTORY EQUIV
POLI1001 POLITICAL SCI CORE EQUIV

FALL 2016 ARTS & SCIENCES

MUSA1200 INTRO TO MUSIC 03 A-
PHIL1070 PHILOSOPHY OF PERSON I 03 B+
POLI1041 FUND/CONCEPTS OF POLITICS 03 B
SPAN1115 INTERMEDIATE SPANISH I 03 B+
THEO1001 BIBLICAL HERITAGE I 03 C+
UNCS2245 FRESHMAN TOPIC SEMINARS 01 P

EARNED CREDITS: 16 GPA: 3.132

SPRING 2017 ARTS & SCIENCES

BIOL1420 THE GENETIC CENTURY 03 A-
PHIL1071 PHILOSOPHY OF PERSON II 03 B+
POLI1042 INTRO TO MODERN POLITICS 03 A
SPAN1116 INTERMEDIATE SPANISH II 03 A-
THEO1002 BIBLICAL HERITAGE II 03 B

EARNED CREDITS: 15 GPA: 3.534

SUMMER 2017 ARTS & SCIENCES

POLI1206 THE POLITICS OF SELF-RULE 03 A

EARNED CREDITS: 03 GPA: 4.000

FALL 2017 ARTS & SCIENCES

HIST4451 CHURCH&STATE IN AMERICA 03 A
BSLW1021 LAW I/INTRO TO LAW 03 A-
MATH1004 FINITE PROB/APPLICATIONS 03 A
POLI2317 AMERICAN PRESIDENCY 03 A
POLI2665 THE QUESTION OF JUSTICE 03 B+

EARNED CREDITS: 15 GPA: 3.800

-----END OF COLUMN-----

SPRING 2018 ARTS & SCIENCES

EESC1177 COSMOS 03 B+
HIST4891 SCIENCE & RELIGION IN US 03 A-
PHIL2264 LOGIC 03 B+
POLI2432 POSTCOMMUNIST TRANSITIONS 03 B
SOCY1030 DEVIANCE/SOC CONTROL 03 B+
UNAS2251 MOCK TRIAL PRACTICUM 01 P

EARNED CREDITS: 16 GPA: 3.332

FALL 2018 ARTS & SCIENCES

HIST2475 AMERICA'S WAR IN VIETNAM 03 A-
HIST4552 RACE, RIGHTS AND THE LAW 03 A-
MUSA1300 HIS OF POPULAR MUSIC 03 B+
POLI3303 THE FEDERAL JUDICIARY 03 A
POLI2327 US CONSTITUTIONAL DEVELOP 03 A-

EARNED CREDITS: 15 GPA: 3.668

SPRING 2019 ARTS & SCIENCES

HIST4462 US CONSTITUTIONAL HIST II 03 A
POLI2334 POLITICAL BEHAVIOR 03 A-
POLI2386 CIVIL LIBERTIES 03 A
POLI2548 THE WORLD WARS 03 B+

EARNED CREDITS: 12 GPA: 3.750

FALL 2019 ARTS & SCIENCES

GERM1001 ELEMENTARY GERMAN I 03 P
GERM1003 ELEMENTARY GERMAN PRAC I 01 A
GERM2203 REPRESENTING HOLOCAUST 03 A
HIST4299 THIRD REICH 03 B+
FORS5315 VICTIMOLOGY 03 A
FORS5318 FORENSIC SCIENCE I 03 A-

EARNED CREDITS: 16 GPA: 3.769

SPRING 2020 ARTS & SCIENCES

HIST4496 US FOREIGN POL/1945-PRES 03 P
HIST2257 BRITISH EMP:BEOWULF-BREXIT 03 P
FORS5317 FORENSIC MENTAL HEALTH 03 A
POLI3337 PARTY NOMINATIONS 03 A-

EARNED CREDITS: 12 GPA: 3.835

TOTAL EARNED CREDITS: 120 GPA: 3.587

-----END OF RECORD-----

ISSUED TO: WILLIAM NORMAND MERCIER II
18 Glen Hollow Dr
Monroe CT 06468

Mary French
Unofficial without signature
Mary French, Registrar



STEVEN L. CHANENSON
PROFESSOR OF LAW
CHARLES WIDGER SCHOOL of LAW
Director of the Girard diCarlo Center for Ethics, Integrity and
Compliance

May 10, 2023

The Honorable Judith C. McCarthy
United States District Court for the Southern District of New York
The Hon. Charles L. Brieant Jr. Federal Building and Courthouse
300 Quarropas Street
White Plains, NY 10601

RE: Recommendation for Will Mercier

Dear Judge McCarthy:

I write to recommend that you hire William (Will) Mercier, Villanova University Charles Widger School of Law Class of 2023, to serve as one of your law clerks.

Mr. Mercier is a bright and hard-working student, an inquisitive and enthusiastic lawyer-in-training, and a pleasure to get to know in and outside of class. He will make an excellent clerk.

Mr. Mercier has done well in law school, and his stratospheric class rank is well-deserved. For example, I had the pleasure of Mr. Mercier's presence in my Criminal Procedure: Adjudication course last fall, and he distinguished himself in conversations about the material. It is an interactive course and I feel qualified to evaluate him on several levels. He was consistently my "go to" person to advance the discussion. Indeed, his questions in class reflected very sophisticated thought and careful attention to the difficult issues we studied.

On an interpersonal level, I find Mr. Mercier to be both engaging and mature – a rare combination in a law student. He would be a welcome, collegial member of any work environment. Furthermore, Mr. Mercier has a passion for the law and a keen awareness that the law is not a mere abstraction, but rather has real consequences for real people.

He is a quick learner and a dedicated worker. He reliably draws the kind of conceptual connections we all like to see new lawyers make. He presents his arguments well and

299 North Spring Mill Road | Villanova, Pennsylvania 19085 | PHONE 610 519-7459 | chanenson@law.villanova.edu

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persuasively. In short, Mr. Mercier has the ability, initiative, and demeanor to be a first-rate clerk and a fine addition to your chambers.

I urge you to give Mr. Mercier your most serious consideration.

Sincerely,

A handwritten signature in cursive script, reading "Steven L. Chanenson".

Steven L. Chanenson
Professor of Law



TUAN SAMAHON
PROFESSOR OF LAW
CHARLES WIDGER SCHOOL of LAW

May 15, 2023

The Honorable Judith C. McCarthy
United States District Court for the Southern District of New York
The Hon. Charles L. Brieant Jr. Federal Building and Courthouse
300 Quarropas Street
White Plains, NY 10601

Re: Clerkship recommendation letter for Will Mercier

Dear Judge McCarthy:

I very strongly recommend Will Mercier for a federal judicial clerkship in your chambers to commence after July 2023, by which date he will have graduated from Villanova Law and sat for the bar. My basis for assessing Will was his superlative performance in my Civil Procedure course as well as his excellent work in my Federal Courts course during his 2L year. Will received an “A” in both Civil Procedure and Federal Courts. His performance in these courses is consistent with his overall law school record, as represented by his strong cumulative GPA (3.83) and class ranking, which places him in the top 6%. He is very solidly on track for graduation *magna cum laude*. This accomplishment is made all-the-more notable because Will is a “first generation” college graduate in his family who did not have the advantage of parents coaching him on success in law school. Nonetheless, among our students who are applying for federal judicial clerkships, Will is among the top candidates applying from Villanova University Charles Widger School of Law this year.

Villanova succeeded in recruiting Will, a Boston College graduate, with a full tuition Dean’s merit scholarship. Doubtless he would have excelled at any number of law schools. At Villanova, he enriches classroom discussion with his active questioning and engagement with unsettled issues in law and public policy. Will has demonstrated his commitment to professionalism and intellectual engagement with the Law by securing several difficult to win legal positions. Last summer, he was selected as a fellow by The Fund for American Studies and then worked as a legal intern at George Mason University’s Liberty and Law Center. Subsequently, he received public service training and experience while working with a county prosecutor’s office where he obtained hands-on litigation experience. The following summer, Cozen O’Connor had the good sense to hire Will as a litigation associate in their Philadelphia office.

299 North Spring Mill Road | Villanova, Pennsylvania 19085 | PHONE 610 519-7088 | FAX 610 519-6282 | samahon@law.villanova.edu | law.villanova.edu

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Notwithstanding his busy academic schedule, Will served as a managing editor for the *Villanova Law Review*. He authored a law review note, “Let’s Talk about the Right to Remain Silent: *Tekoh v. County of Los Angeles* and the Murky Constitutional Status of *Miranda v. Arizona*,” but ultimately it was not selected for publication.

Will’s long-term professional goal is to accept a public service-oriented legal position handling litigation. He is particularly interested in serving as an Assistant U.S. Attorney. Given his strong commitment, I anticipate he will follow that path. Accordingly, he would benefit from mentoring by those who currently serve in government.

Outside of the classroom, I have interacted with Will at a student-faculty lunch as well as law school center events and find him to be appropriately professional and courteous in those settings. It is my estimation that he would be appropriately deferential to the Court and appreciate his place as a confidential legal advisor and researcher with the judicial function firmly in the Court’s hands.

I have not supervised Will’s writing closely. Accordingly, I am unable to evaluate his writing outside the context of closed-book examinations at which he obviously excels. I, however, have reviewed his student note and find it to be well researched and written.

In light of Will’s demonstrated academic excellence, ambition, and hard work, it is my very strong recommendation that you hire him as one of your judicial law clerks.

If you require any further information, please reach me at (610) 519-7088 or at samahon@law.villanova.edu.

Respectfully submitted,



Tuan N. Samahon
Professor of Law



MICHAEL P. MORELAND
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May 10, 2023

The Honorable Judith C. McCarthy
United States District Court for the Southern District of New York
The Hon. Charles L. Brieant Jr. Federal Building and Courthouse
300 Quarropas Street
White Plains, NY 10601

Re: Recommendation for William Mercier

Dear Judge McCarthy:

It is a pleasure to recommend Will Mercier for a clerkship in your chambers. I first met Mr. Mercier when he arrived at Villanova in the fall of 2020, he was a student in my Torts class in the fall of 2020, and we have spoken about his professional interests several times over the past year.

Among a strong group of students in Torts, Mr. Mercier excelled. Indeed, he was among the very best students in the class and his exam was among the top in the entire class, easily earning an A. He was routinely able to formulate sophisticated legal arguments when analyzing the issues presented in class and was always well prepared. That performance has been consistent throughout college and law school. He is currently ranked 10th out of 172 students in his class.

In addition to these achievements in the classroom, Mr. Mercier is an editor on the *Villanova Law Review* and has sought out a range of excellent professional opportunities as an intern for the Fund for American Studies and the George Mason Liberty and Law Center his 1L summer and currently as a summer associate at Cozen O'Connor in Philadelphia for his 2L summer. I enthusiastically recommended Mr. Mercier for an externship with the Foundation for Individual Rights in Education for the fall of 2022 because I knew the Foundation's work aligned with his own passion for free speech and open inquiry.

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IGNITE CHANGE. GO NOVA®

Mr. Mercier is a well-rounded, smart, and conscientious young man. I know he will make an outstanding law clerk and give him my highest and unqualified recommendation. You may contact me at the above telephone number or e-mail address should you have any questions.

Sincerely,

Michael P. Moreland

Sincerely,



Michael P. Moreland

IN THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CASE NO. 21-5050

DANIEL DAVIS, Appellant

v.

UNITED STATES OF AMERICA, Appellee

On Appeal From
The United States District Court for the Southern District of Indiana

BRIEF FOR APPELLEE

William N. Mercier II
Attorney for Appellee

QUESTION PRESENTED

Under the Fourth Amendment, does a police officer's warrantless entry into a suspect's house to obtain clothing and shoes violate that suspect's right against unreasonable searches and seizures when the presence of shrapnel and debris on the scene was reasonably likely to cause injury to the defendant during arrest?

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STATEMENT OF JURISDICTION

The final judgment of the United States District Court for the Southern District of Indiana was entered on October 22, 2021. Appellant filed a timely notice of appeal on November 20, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STANDARD OF REVIEW

The district court denied the Defendant's motion to suppress and determined that there was an exigent circumstance present which allowed the police to enter the Defendant's home without a warrant. When reviewing a district court's denial of a motion to suppress, the court of appeals reviews the district court's legal conclusions *de novo* and factual conclusions for clear error. See United States v. James, 571 F.3d 707, 713 (7th Cir. 2009). When a court reviews a legal conclusion *de novo*, the court independently examines the legal question at issue and comes to its own conclusion. See e.g., United States v. Mills, 122 F.3d 346, 347 (7th Cir. 1997). A court determines that a factual finding is clearly erroneous "when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." United States v. Tilmon, 19 F.3d 1221, 1224 (7th Cir. 1994).

STATEMENT OF THE CASE

This Court is being asked to affirm the decision of the United States District Court for the Southern District of Indiana that found that there was no Fourth Amendment violation, and thus denied the Defendant-Appellant's Motion to Suppress. The Appellant is challenging the constitutionality of an officer's warrantless entry into his home to obtain clothing in order to protect him from injury upon arrest.

On March 6, 2021, Officer Adrian Monk, a sworn member of the Bloomington, Indiana, Police Department was dispatched to respond to reports of a loud noise in the Forest Trails area of Bloomington. R. 10. An individual in the area called 911 and reported a "loud, explosion-like sound" coming from the home of the Appellant, Daniel Davis. Id. Officer Monk was familiar with the Appellant, and knew that he had served three years in prison for federal drug crimes. Id. Piecing this information together, Officer Monk suspected that he could be responding to a methamphetamine lab explosion. Id.

Forest Trails is a rather sparsely populated area of Bloomington. Id. Typically, residents of Forest Trails live in cabins on five-acre lots of land. Id. Each residence in the area is set back several hundred feet from the main road, and these cabins are obscured by both the distance and heavy forestation. Id. To get to the scene of the suspected crime, Officer Monk had to leave his police vehicle behind and walk 300 feet down a dirt path. Id. Once he made his way down this path toward the cabin, Officer Monk spotted the Appellant, standing shirtless and shoeless, staring at a trailer, located about 150 feet to the right of the Appellant's cabin. Id. The cabin exhibited severe damage, consistent with that of a methamphetamine lab explosion. Id.; R. 12. The trailer was missing several walls and windows, and shards of debris traveled the 150 feet to

land right in front of the Appellant's cabin. R. 10. After assessing the scene, Officer Monk placed the Appellant under arrest. Id.

The Appellant was both shirtless and shoeless when he was placed under arrest. Id. Officer Monk was worried that the Appellant would be injured during the course of the arrest because of Appellant's partially clothed condition. Id. Officer Monk estimated that the outside temperature at the time was around 50 degrees, but it was the early evening, and the temperature was dropping as the sun set. Id. Also, Officer Monk observed that it was windy. Id.

Additionally, Officer Monk thought that the Appellant's bare feet presented a problem because of the long walk back to his vehicle. Id. The explosion caused the windows to break, and shards of glass were strewn across the property. Id. Officer Monk suspected that there would be dangerous debris along the long path to the police vehicle, in particular, because of the path's close proximity to the explosion site. Id.

Officer Monk decided that the best course of action to prevent injury would be to get clothes from inside the Appellant's residence. Id. Officer Monk attempted to obtain the Appellant's consent to enter the residence, but the Appellant declined and insisted that he would walk to the vehicle barefoot. Id. Officer Monk continued to believe that there was a substantial risk of injury to the Appellant, so he pursued the course of action that would prevent injury and he entered Appellant's residence to obtain clothing. Id. Karen Rooth, the Appellant's roommate, was present during Officer Monk's interactions with the Appellant, but Rooth stayed silent and did not offer to assist Officer Monk in procuring clothing. Id.; R. 11. Officer Monk did not ask for, nor did Rooth offer, her consent to his entrance. R. 11.

Once inside the residence, Officer Monk went straight to the Appellant's bedroom to obtain a shirt and shoes. R. 11. There is nothing in the record suggesting shoes or a shirt were

readily available to Officer Monk before reaching the bedroom. Upon entering the bedroom, he saw a firearm laying on the floor. Id. The gun, described as “a nine-millimeter handgun,” was immediately visible to Officer Monk upon entering the bedroom. Id. Consistent with Officer Monk’s knowledge that the Appellant was a convicted felon, he seized the firearm as contraband. Id. Officer Monk was then able to find shoes and a sweater in the bedroom, which he brought out to the Appellant. Id. The Appellant dressed, put on the shoes, and then was able to safely walk to the vehicle. Id. Officer Monk drove the Appellant back to the police station. Id.

On May 1, 2021, less than two months following the arrest and discovery of the gun, the Appellant was indicted by a grand jury in the Southern District of Indiana with one count of violating 18 U.S.C. § 922(g)(1) which bars convicted felons from possessing firearms. R. 2. The Appellant then filed a Motion to Suppress the handgun on May 28. R. 3–5. The district court was fully briefed, and District Judge Gretta Dearing denied the Appellant’s Motion to Suppress on July 2. R. 13–15. Judge Dearing found that an exigent circumstance justified the warrantless entry into the Appellant’s home, and thus no Fourth Amendment violation occurred. R. 14–15. After a full trial, a jury found the Appellant guilty as charged in the indictment. R. 16. Judge Dearing sentenced the Appellant to sixty months of imprisonment on October 22, 2021. R. 16–17. On November 20, 2021, the Appellant filed a notice of appeal of the district court’s denial of the Motion to Suppress. R. 18. This court should affirm the district court’s denial of the Motion to Suppress.

SUMMARY OF THE ARGUMENT

Daniel Davis, the Appellant, was barefoot and shirtless when he was arrested outside of his home; the risk of injury posed by the Appellant's partially clothed condition constituted an exigent circumstance that allowed Officer Adrian Monk to enter the Appellant's home without a warrant in order to procure clothing and shoes. Law enforcement officers need the ability to protect those in their custody from injury. This Court should affirm the district court's denial of the Appellant's motion to suppress evidence.

While generally law enforcement officers must have a warrant before entering a residence, there is an exception to this rule when the totality of the circumstances shows the presence of an exigent circumstance that renders a warrantless search reasonable. Here, the exigent circumstance was the potential for injury to the Appellant during the course of arrest because he was barefoot and shirtless. Law enforcement officers must be able to take reasonable steps to prevent criminal suspects in their custody from being harmed during the course of arrest; entering the home to obtain clothing is a reasonable step.

Here, the Appellant was at risk of injury because he was barefoot and shirtless; both conditions presented potential harms that allowed for Officer Monk to enter the Appellant's home to obtain clothing. First, because of the Appellant's lack of shoes, the Appellant was at risk of suffering lacerations on his bare feet. There need not be specific hazards on the ground in order to justify an entry into the home to obtain shoes. Courts have allowed the exception to be used when there were specific hazards on the ground, such as broken glass, as well as general hazards, such as those associated with public streets. At the scene of the arrest, there were hazards on the ground from the methamphetamine lab explosion, including the likely presence of broken glass. This justified Officer Monk's entrance of the home to procure shoes.

Moreover, the weather conditions at the time of the Appellant's arrest also justified Officer Monk's entrance to obtain clothing. Colder temperatures justify a law enforcement officer taking action to prevent an arrestee from harm. The weather need not be frigid, but rather, as other courts have held, a mere chilly night may be a sufficient justification for a police officer to enter the home to obtain clothing. Here, the temperature was dropping as night set in, and it was windy, thus providing additional sufficient justification for Officer Monk to act.

The entry into a home to procure clothing may not be pretextual and it must be limited in scope. Law enforcement officers must be acting in good faith and cannot use a defendant's lack of clothing as a cover for an ulterior motive to search for incriminating evidence. Officer Monk acted in good faith when searching the Appellant's house for clothing. He went straight to the Appellant's bedroom to get shoes and a shirt to safely complete the arrest. It was only while doing this that he discovered the illegally owned firearm.

Additionally, in cases where there is an exigency, it is unnecessary for law enforcement to obtain consent to enter the premises. The exigency exception to the warrant requirement allows law enforcement officers to take action, whether or not the owner gives consent to enter the home. Because of the exigent circumstances present here, it was irrelevant that the Appellant did not give Officer Monk his consent to enter his home.

For the above reasons, this Court should hold that there was an exigent circumstance present because of the Appellant's lack of shirt and shoes and the potential for injury. Pursuant to this, the entry into the Appellant's home to obtain clothing was justified under the Fourth Amendment. Accordingly, this Court should affirm the district court's denial of the Appellant's motion to suppress evidence.

ARGUMENT

This Court should affirm the denial of the Appellant’s motion to suppress because Officer Monk’s need to obtain clothes to ensure Mr. Davis’ safety constituted an exigency which allowed for warrantless entry into Davis’ home under the Fourth Amendment.

The exigent circumstance present in this case permitted Officer Adrian Monk to enter Daniel Davis’s home without a warrant, and thus the firearm discovered during that search was not found in violation of the Fourth Amendment. Mr. Davis, the Defendant-Appellant, was partially clothed and shoeless when he was encountered by law enforcement. This presented an exigent circumstance because the Appellant would have been at risk of injury had law enforcement transported him without clothing. Particularly, there was likely debris, such as broken glass, present in the path that the Appellant would have had to walk to get to Officer Monk’s police vehicle. The potential of walking on a path with broken glass while barefoot presented a significant risk of injury to the Appellant.

The Fourth Amendment to the United States Constitution relevantly states: “The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated . . .” U.S. Const. amend. IV (emphasis added). The Fourth Amendment requires law enforcement to have a warrant before they may enter or search a suspect’s home. See Lange v. California, 141 S.Ct. 2111, 2117 (2021). There is an exception to the warrant requirement when “the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable.” Id. (alteration in original) (citation omitted). “An action is reasonable under the Fourth Amendment, regardless of the individual officer’s state of mind, as long as the circumstances, viewed objectively, justify [the] action.” Brigham City, Utah v. Stuart, 547 U.S. 398, 404 (2006) (internal quotation marks omitted) (alteration in original) (emphasis omitted) (citation omitted). An officer may enter a

house without a warrant so long as the “totality of the circumstances shows an emergency” Lange, 141 S.Ct. at 2021. The purpose of this exception is to allow law enforcement to act in “situations presenting a compelling need for official action and no time to secure a warrant.” Id. (citations omitted) (internal quotation marks omitted).

Here, there was an exigent circumstance present because the Appellant was partially clothed and shoeless. He was at risk of injury due to the debris in his path and the dropping temperature. Law enforcement was justified in going into the Appellant’s home in order to obtain shoes and clothing to prevent injury. It was during this justified entry where law enforcement discovered the firearm in plain sight. Law enforcement’s activities within the Appellant’s home were limited to obtaining clothing to facilitate the arrest. The Appellant’s consent to enter the home was unnecessary due to the presence of an exigent circumstance. Therefore, this Court should affirm the judgment of the trial court and deny the Appellant’s motion to suppress because under the totality of the circumstances the Appellant’s partially-clothed state was an exigent circumstance that justified Officer Monk’s entry into the Appellant’s home.

A. The warrantless entry into Mr. Davis’s home was justified under the totality of the circumstances because it was reasonable for Officer Monk to believe that the Appellant would be injured during the arrest because Davis was both shoeless and shirtless.

Officer Monk identified a risk of injury to Mr. Davis’s during the course of an arrest because he was shirtless and shoeless, and in response to this, he entered the Appellant’s house without a warrant to procure clothing and shoes. Law enforcement officers need the ability to protect criminal suspects from injury upon arrest. Police should be “authorized to take reasonable steps to address the safety of the arrestee and that the arrestee’s partially clothed status may constitute an exigency justifying the officer’s temporary reentry into the arrestee’s home to

retrieve clothes reasonably calculated to lessen the risk of injury to the defendant.” United States v. Gwinn, 219 F.3d 326, 333 (4th Cir. 2000). Under the totality of the circumstance, the need to protect arrestees from harm due to lack of clothing is an exigent circumstance which allows for law enforcement to conduct limited, warrantless searches of homes in order to procure clothing for these arrestees.

1. The presence of debris, including the likelihood of broken glass, on the ground presented a danger to the Appellant because he was not wearing any shoes

The Appellant was at risk of injury during the course of the arrest because he was not wearing shoes and there was debris on the path the Appellant had to walk to get to Officer Monk’s police vehicle. Several of this Court’s sister circuits have determined that the risk of injury to a suspect that is posed by walking barefoot is an exigent circumstance that justifies the warrantless entry into a suspect’s home to obtain shoes. See Gwinn, 219 F.3d at 333; United States v. Wilson, 408 F.3d 214, 240–41 (5th Cir. 2002); United States v. Butler, 980 F.2d 619, 621 (10th Cir. 1992).

For example, the defendant in Gwinn was arrested while barefoot and shirtless in “a remote area . . . in West Virginia” Gwinn, 219 F.3d at 333. Law enforcement entered the defendant’s home to procure clothing, and they found a pair of boots for the defendant to wear. Id. at 329. A firearm was discovered within one of these boots. Id. The defendant was charged with being a felon in possession of a firearm. Id. at 330. The court in Gwinn did not note any particular hazards present on the ground, but rather noted that “[w]herever [the defendant] might walk while in these troopers’ custody, he would face the substantial hazards of sustaining cuts or other injuries to his feet.” Id. The Fourth Circuit found that the warrantless entry into the house was legal because of the exigent circumstance of needing to protect the arrestee from injury. Id.

at 333. The Fourth Circuit did not find it necessary “that the government . . . present specific evidence of every nail, piece of glass, stone or other hazard . . .” Id. Rather, law enforcement officers only need to show that the steps they are taking are “reasonable” and “calculated to lessen the risk of injury to the defendant.” Id. at 333.

Similarly, in United States v. Wilson the Fifth Circuit determined that there not need be specific hazards present on the ground for a shoeless defendant. 408 F.3d at 241. Rather the court found that the mere “hazards of public sidewalks and streets pose a threat of injury to the feet and other exposed areas of the body” were enough to justify entry into the home to retrieve shoes. Id. In Wilson, an individual was arrested while only wearing boxer shorts; he was also shoeless. Id. at 234. Law enforcement entered the individual’s apartment to obtain clothing, and inside the apartment they encountered the defendant, a felon, in possession of a firearm, and he was charged accordingly. Id. The defendant challenged the legality of the entrance to the apartment on the basis of the purported exigency of the need to obtain clothing. Id. at 240. The Fifth Circuit determined that the need to obtain clothing constituted an exigent circumstance, despite the absence of specific hazards on the ground, such as broken glass. Id. at 241. The court held that in situations where there is a partially clothed arrestee, “the potential of a personal safety hazard to the arrestee places a duty on law enforcement officers to obtain appropriate clothing.” Id.

However, United States v. Butler did involve specific hazards, such as broken glass, on the ground. 980 F.2d at 620. In Butler, the defendant was arrested outside his home while he was barefoot. Id. On the ground, besides the broken glass, there were “several hundred beer cans, and the parts from various motor vehicles.” Id. The court noted that because of the hazards on scene and the defendant’s barefoot state “there was no route by which [the defendant] might have been

conveyed safely to the officers' vehicles." Id. Because of this, the officer entered the house to obtain shoes, and during this limited search he found several firearms, which the defendant was prohibited from owning due to his status as a felon. Id. The Tenth Circuit found the warrantless entry into the defendant's home was justified because "taking [the defendant] to the officers' vehicles would have posed a serious risk to his health." Id. at 622.

Here, the facts are similar to those in Gwinn, and there was a risk of injury to the Appellant's feet. Officer Monk had a good faith belief that, because the windows of the Appellant's trailer were blown out, there would be glass and other debris from the explosion on the path that the Appellant would have to walk to get to Officer Monk's police vehicle. See R. 10. Particularly, Officer Monk noted pieces of debris right in front of the Appellant's trailer. Id. As in Gwinn, Officer Monk did not document every shard of glass along the path when making his decision to enter the home to obtain clothing. Rather, Officer Monk reasonably determined that there was a likelihood that, if he was forced to make the walk barefoot, the Appellant would be injured on the journey from the house to the police vehicle. Id. Officer Monk's action of entering the home to obtain shoes, albeit without a warrant, was intended to lessen the chance of injury to the Appellant during the course of the arrest.

Unlike Wilson, the scene here was not a public sidewalk or street, but rather a private driveway. The Appellant's driveway was unpaved and about 100 yards long. R. 10. The Wilson court determined that public sidewalks and roads presented hazards that were significant enough to justify warrantless entry. Presumably, the Appellant's driveway would present *more* hazards than a paved sidewalk or road. Unpaved, or dirt, roads are often lined with rocks or other jagged objects that could cut a person's foot and cause injury.

It would have been inefficient, if not impossible, for Officer Monk to obtain a warrant to enter the home to obtain shoes for the Appellant. The Appellant was already placed under arrest and Officer Monk was at the scene alone, so he could not reasonably leave the Appellant to bring a warrant application before a magistrate. Because of the likelihood of broken glass and the unpaved path that the Appellant would have had to walk while barefoot there was a reasonable likelihood that injury would result. Under the totality of the circumstances, this constituted an exigent circumstance. Officer Monk needed to prevent injury to the Appellant, and it was reasonable for him to enter the Appellant's home to procure shoes.

2. The dropping temperature and windy conditions presented a risk to Mr. Davis because he was not wearing a shirt

Additionally, the Appellant was not wearing a shirt when he was arrested, and the chilly, dropping temperature and windy conditions present at the scene of the arrest provided additional justifications for Officer Monk's warrantless entry into the home to obtain clothing. Procuring clothing for a partially dressed arrestee is yet another reasonable step an officer should be allowed to take in order to reduce the risk of potential harm to those being taken into custody. See Gwinn, 219 F.3d at 333.

In United States v. Gwinn, the defendant was shirtless when he was arrested in West Virginia; he was only clad in blue jeans. Id. The arrest took place "during the evening hours in early May." Id. The officer entered the defendant's house, without a warrant, to retrieve a shirt and shoes for him to wear, and during this search he found contraband. Id. at 330–31. The Fourth Circuit determined that the defendant faced potential harm due to the weather and his lack of clothing, specifically emphasizing "the increasing chill during the evening hours of an early May day." Id. at 333; see also United States v. Nascimento, 491 F.3d 25, 50 (1st Cir. 2007) (finding that "the New England climate counseled . . . in favor of a more complete wardrobe" because the

arrestee was wearing only underwear during December in Massachusetts). The court in Gwinn stated that the government need not “present specific weather forecasts to justify its concern for [an arrestee’s] safety and well-being.” Gwinn, 219 F.3d at 333. It must be examined whether law enforcement’s determination to enter the home without a warrant was “reasonably calculated to lessen the risk of injury to the [arrestee].” Id.

But, in United States v. Kinney, the Sixth Circuit determined that the warrantless entry of a home could not be conditioned simply because an arrestee “was not fully clothed.” 638 F.2d 941, 945 (6th Cir. 1981). In Kinney, the defendant was arrested while on the porch of his home. Id. at 943. Following the arrest, he was taken into the home by the officers. Id. The arrestee challenged the entry into the home, as law enforcement had no search warrant. Id. Law enforcement justified the entry on the fact that the arrestee’s “shirt was unbuttoned.” Id. Nothing in the opinion suggests that the law enforcement officers entered the home to procure additional clothing for the arrestee, nor does it mention chilly weather conditions. The Sixth Circuit found the entry to be unlawful because the arrestee “did not request permission to secure additional clothing and did not consent to an entry of his home.” Id. at 945.

Here, the Appellant was shirtless when he was arrested. R. 10. Officer Monk estimated that the temperature “was about 50 degrees . . . and getting colder and windy. The sun had already started to set.” Id. The circumstances are similar to Gwinn, where the defendant was also shirtless while outside in the evening. The chill in the air created a potential risk for the Appellant, and Officer Monk sought to get a shirt in order to reduce this possible harm. While the weather conditions in March in Indiana may not be as frigid as those in Nascimento, the temperature and windiness presented a reasonable risk of harm that Officer Monk saw an opportunity to prevent by procuring clothing. Exigency should not be conditioned on a specific

temperature, but rather whether, given the circumstances, the officer perceives a reasonable risk to the arrestee's safety.

The facts here are distinguishable from Kinney. In Kinney, the arrestee *was* wearing a shirt, but the shirt was unbuttoned. Here, the Appellant was shirtless, and thus had no protection on the upper half of his body from the cold. R. 10. Also, law enforcement in Kinney did not claim to enter the house to procure more clothing. That was not the case here, for obtaining clothing for Appellant to wear during arrest was the only purpose of Officer Monk's entrance. See R. 10–11. The need to procure clothing to prevent the Appellant from harm constituted an exigency; in Kinney there was no exigency because the arrestee was clothed, just unbuttoned.

Under the totality of the circumstances, there was an exigency that justified Officer Monk's warrantless entry into the home. The Appellant was at risk of injury due to his lack of clothing, and Officer Monk had to act to ensure that he would be able to safely transport the Appellant back to the police station. This Court's sister circuits have recognized that there is a risk of injury present in cases with similar circumstances. Because warrantless entries of a home are legal when there is an exigent circumstance, this Court should affirm the denial of the Appellant's motion to suppress.

B. The search of the Defendant's home was not pretextual and was limited in scope as to only obtain shoes and clothing.

Officer Monk's search was narrowly confined to only look for shoes and clothing. Other courts have emphasized that in cases where warrantless entry is based on the exigency of lack of clothing, law enforcement may not use this exception as a pretext. See Gwinn, 219 F.3d at 334. Additionally, searches to obtain clothing should be "strictly limited to the purpose of retrieving shoes and clothing." Id. Law enforcement may not use the warrantless entry into a home to obtain clothing as "a blank check for intrusion upon the privacy of the sloppily dressed." Butler,

980 F.2d at 621. Courts have examined whether evidence suggested that law enforcement’s entry was done in bad faith. In Butler, the appellate court relied on the district court’s findings that “there was no evidence that the concern for [the arrestee’s] welfare . . . was a pretext by which the police sought to enter the mobile home.” Id.; see also Gwinn, 219 F.3d at 334 (“[T]here was no evidence or even a claim that Trooper Thomas’ reasons for reentering the trailer were pretextual.”).

Here, Officer Monk’s entrance was not pretextual, nor did his search go beyond the scope of obtaining clothes for the Appellant to wear during the arrest. The district court determined that Officer Monk was acting “in good faith” when he “perceived a threat to the [Appellant].” R. 14. While it is true that Officer Monk was “aware of the possibility . . . [of discovering] incriminating evidence while inside the cabin,” this was not his motivation in entering the cabin. R. 10. Officer Monk had no reason to suspect that there would be a firearm in the house; the reason he was called to the scene in the first place was to investigate a meth lab explosion, not firearm violations. Id. Officer Monk entered the home with the purpose of procuring a shirt and shoes for the Appellant, not to search for evidence. Id. Once inside the house, he “proceeded directly to [Appellant’s] bedroom.” Id. The bedroom is most commonly where people keep their clothes and this is the *only* location where Officer Monk conducted his search. Monk did not scour Appellant’s house from top to bottom, hoping to find any shred of incriminating evidence. Rather, Officer Monk just happened to come across the firearm in the Appellant’s bedroom while he was getting clothes and shoes for the Appellant. R. 11. Because the exigency was not used as a pretext to enter the home and the search for clothing was limited in scope, this Court should affirm.

C. The Appellant's lack of consent to the search does not negate the exigent circumstance that justified Officer Monk's warrantless entry.

The exigent circumstances exception to the warrant requirement is not dependent on whether the arrestee gives consent to enter a home. The need to enter a home in order to procure clothing to prevent injury is an exigent circumstance which vitiates the need for a warrant. See Gwinn, 219 F.3d at 333–34. Because of the exigency, lack of consent from a homeowner does not invalidate a law enforcement officer's ability to enter a home to obtain clothing. See United States v. Anthon, 648 F.2d 669, 675–76 (10th Cir. 1981).

In United States v. Anthon, an individual was arrested in the hallway of a hotel while wearing a bathing suit. Id. at 672. The arrestee was brought back to his hotel room to change, and the police officers found narcotics therein. Id. at 674–75. The arrestee did not consent, nor request, for law enforcement to bring him to his room. Id. at 675. Moreover, the court in Anthon determined that “[t]he arrest in the hotel hallway did not provide exigent circumstances justifying a warrantless search of the hotel room.” Id. Because there was no consent, nor exigent circumstance, the Tenth Circuit held that the search was illegal. Id. at 676.

However, Anthon was distinguished by United States v. Butler, and the Tenth Circuit made it clear that an entry to obtain clothing was legally permissible, despite the fact that there was no consent given to enter the house, because of the presence of exigent circumstances. See Butler, 980 F.2d at 622. The difference between the two cases was “the presence of a legitimate and significant threat to the health and safety of the arrestee.” Id. No consent is necessary in cases where there is such a threat, and thus an exigent circumstance, present. See id. at 621.

Here, consent was not necessary because of the threat of injury to the Appellant. It is true that Officer Monk did not obtain consent to enter from either the Appellant, nor the Appellant's roommate. R. 10–11. However, ultimately this consent was unnecessary because the Appellant's

lack of shoes and shirt created an exigent circumstance due to the likelihood that he would have been injured on the walk back to the police vehicle.

Making consent a condition of warrantless entry would defeat the purpose of the exigency exception. For example, in Brigham City, Utah v. Stuart, the exigency exception was predicated on a fight that was occurring at a house party. 547 U.S. at 401. Law enforcement saw the fight occurring through a window and entered the house, without a warrant, to provide assistance. Id. They did not obtain consent prior to their entrance. Still, the Supreme Court determined that the entry into the house was lawful, for the entrance was justified by an exigent circumstance in order “to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.” Id. at 403. The Supreme Court has emphasized other exigencies which permit warrantless entry including preventing the destruction of evidence and fighting fires. See id. Obtaining consent of the owner to enter the properties in such circumstances would frustrate law enforcement’s ability to effectively respond to these situations and handle the emergency. In Stuart, if consent were a requirement prior to entry, law enforcement would have first had to track down the owner of the home, then they could possibly enter, but only if given permission. All the meanwhile, the fight was ongoing, and people were in danger. Predicating the exigency exception on consent would tie law enforcement’s hands and leave them powerless to stop ongoing emergencies. Here, because there was an exigency, the Appellant’s consent was not necessary for Officer Monk to procure clothing, and this Court should affirm.

CONCLUSION

Because obtaining clothing to prevent a suspect from being injured in the course of a criminal arrest qualifies as an exigent circumstance, Appellee respectfully requests that this Court affirm the judgment of the United States District Court for the Southern District of Indiana.

Respectfully Submitted,

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